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No. _____

In The
Supreme Court of the United States

JOAN WAGNON, Secretary, Kansas Department of Revenue, SHEILA WALKER, Director of Vehicles, State of Kansas, and WILLIAM SECK, Superintendent, Kansas Highway Patrol, State of Kansas, in their official capacities,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) should be applied to preempt a State's off-reservation enforcement of its motor vehicle code.

2) Should the Court abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependant upon congressional intent?

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OPINIONS BELOW

The March 25, 2005, decision of the United States Court of Appeals for the Tenth Circuit is reported at 402 F.3d 1015 (10th Cir. 2005), and is included in the petition appendix. The decision of the District Court is reported at 276 F.Supp.2d 1168 (D. Kan. 2003) This decision is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision in this case on March 25, 2005. This petition has been filed within ninety (90) days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

18 U.S.C. § 3243 in pertinent part provides that

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over

> offenses committed elsewhere within the State in accordance with the laws of the State.

Kan. Stat. Ann. § 8-142 (2001) provides that

> It shall be unlawful for any person to commit any of the following acts and except as otherwise provided, violation is subject to penalties provided in K.S.A. 8-149, and amendments thereto:
>
> *First:* To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, and amendments thereto, which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the division for the current registration year, including any registration decal required to be affixed to any such license plate pursuant to K.S.A. 8-134, and amendments thereto, subject to the exemptions allowed in K.S.A. 8-135, 8-198[,] and 8-1751a, and amendments thereto.
>
> *Second:* To display or cause or permit to be displayed, or to have in possession, any registration receipt, certificate of title, registration license plate, registration decal, accessible parking placard or accessible parking identification card knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

STATEMENT

1. *Nature of the Suit.* Prairie Band Potawatomi Nation (hereinafter, "Respondent"), filed suit against various Kansas State officials seeking declaratory and injunctive

relief against the State to prohibit the State from enforcing its motor vehicle registration and titling laws off-reservation against any person who owned or operated a vehicle registered and licensed under tribal laws driven beyond the boundaries of Respondent's reservation.

2. *The District Court Proceedings.* Citing the balance-of-interests test articulated in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), the district court determined that the federal and tribal interests preempted the State's interests and permanently enjoined and restrained the State of Kansas from further application and enforcement of its motor vehicle registration or titling laws against Respondent, its members and any persons who operates or owns a vehicle properly registered and titled under Respondent's motor vehicle code. Pet. App. 79. The order applied to vehicles driven both on and off of Respondent's reservation. Pet. App. 79.

3. *The Court of Appeals' Decision.* The Court of Appeals, reviewing the District Court's decision affirmed the district court's Order. Pet. App. 25. The Court of Appeals concluded that the *White Mountain Apache* balance-of-interests test is appropriate to analyze, and ultimately strike, the off-reservation enforcement by the State of Kansas motor vehicle laws against Respondent and its members. Pet. App. 17-19.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts with Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Schism Between Federal Circuit Courts of Appeal.

The Court of Appeals determined that nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As a practical matter, the Court of Appeals has now invoked preemption-by-implication as an appropriate standard to reach beyond a tribe's geographical reservation boundary and strike an otherwise lawful, nondiscriminatory State law imposed off-reservation. This was error.[1]

White Mountain Apache only involved the on-reservation activity of a non-Indian company. This Court addressed only the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis that embodies the balance-of-interests test. This Court thus cited the settled rule three years later in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,'" *id.* at 335 n.18, and, as a result, held that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the

[1] Whether the *White Mountain Apache* balancing test is appropriate in the context of off-reservation taxation by a State is the subject of a case currently pending before this Court. *Richards v. Prairie Band of Potawatomi Nation*, Case No. 04-631.

contrary,'" *id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148-49 (1973)).

Given *White Mountain Apache's* express recognition of that rule, states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, even against tribes or their members without reference to an *ad hoc* and amorphous test used to resolve only the validity of on-reservation state regulation of nonmembers doing business with tribal entities. *See Mescalero Apache Tribe*, 411 U.S. at 148-49 ("State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

This Court has regularly endorsed this principle. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 468 (1995); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Given the force and history of the Court's pronouncements in this regard, it is remarkable that the Court of Appeals did not even pause to consider the point. In any event, the attempt of the Court of Appeals to apply the *White Mountain Apache* rule to off-reservation regulation by the State is directly contrary to the repeated statements and holdings of this Court, and itself merits the grant of certiorari.

In explaining the doctrinal basis for the *White Mountain Apache* test, this Court stated that the "tradition of

Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *White Mountain Apache*, 448 U.S. at 143. In articulating the test itself, the Court required examination of the language of "federal treaties and statutes" in addition to the "notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. The test is directed at the on-reservation intersection of tribal and state sovereignty; it would be doctrinal error to transport the doctrine off-reservation because there is no "tradition of Indian sovereignty" off reservation.

The Court of Appeals' decision constitutes a marked departure from the path-marking *Mescalero Apache Tribe* and its progeny. The decision below leaves substantial doubt concerning a State's ability to regulate Indians off-reservation through nondiscriminatory state laws. The Court of Appeals' decision dramatically departs from controlling authority from this Court, and sharply contrasts with the Ninth Circuit that the balance-of-interests test does not apply to off-reservation state regulation and enforcement of state law against Indians.

Long ago this Court held that in the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland,* 235 U.S. 610, 622 (1915). A state may require registration and licensing of such vehicles and charge reasonable fees. *Id.*

Moreover, this Court has held that a state is not automatically barred from applying its laws even if they

may significantly touch the political and economic interests of tribes. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 157 (1980) (discussing Indian commerce clause).

The Court of Appeals' decision ignored or swept aside the principles laid down in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) that have been followed up through and including *Nevada v. Hicks*, 533 U.S. 353 (2001), that states may regulate the activities of Indians off-reservation. The corollary to this principle is that tribal activity simply cannot extend beyond the bounds of a tribe's reservation to preempt off-reservation state law.

Most telling on this point is *Nevada v. Hicks*, 533 U.S. 353 (2001). Justice Scalia, writing for the majority, found constitutionally unembarrassed the on-reservation execution of a state court-issued search warrant against a tribal member in connection with an off-reservation violation of state game law. This Court observed, citing *Mescalero Apache* as authority, that "[i]t is . . . well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation." *Id.* at 362.[2] The Court then held that such "authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes" (*id.* at 363) because

[2] Kansas too has criminal jurisdiction over reservation Indians. 18 U.S.C. § 3243 provides that: "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."

"tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them[]'" (*id.* at 364).

Hicks, of course, presented a significantly different factual situation, since no on-reservation regulation by Kansas is at play instantly. *Hicks*, nevertheless, negates any suggestion that the *Mescalero Apache* standard is altered by virtue of subsequent, collateral on-reservation effects. As in *Hicks*, any *on-reservation* state conduct attendant to those effects conceivably may raise a preemption issue controlled by special Indian law principles, but the existence of state regulatory authority over the predicate off-reservation conduct remains intact. The Supreme Court's decision in *Hicks* affirmed the vitality of the rule of law expressed in *Mescalero* and *Colville*.

In contrast, the Court of Appeals' decision in this case is contrary to the holding and analysis in *Mescalero, Colville* and *Hicks*. Indeed, it seems as though the underlying principles embodied in these cases have largely been misapprehended by the Court of Appeals. The Court of Appeals distinguished this case from *Hicks* by holding that *Hicks* is limited to a case addressing "tribal interference with legitimate state law enforcement activity on reservation." Pet. App. 13. To shore up its decision, the Court of Appeals determined that "the activity at issue in this case, licensing and titling of vehicles, takes place on the reservation." Pet. App. 14, and "when state interests are secondarily affected, *Bracker* must be applied to ascertain and balance all parties' interests." Pet. App. 15. Yet, the overarching philosophy supporting the conclusion in *Hicks* in no way negates off-reservation state law enforcement. One

is given pause to ask, if *Hicks* stands for the proposition that notions of tribal sovereignty cannot oust on-reservation enforcement by a state of off-reservation state authority, how then can a tribe's sovereignty extend beyond its reservation to oust both state regulation and enforcement off-reservation?

The Court of Appeals got around that question by holding that the activity at issue was the tribe's titling and licensing of tribal member vehicles. Pet. App. 14. Yet, the activity at issue, indeed what precipitated this case, was the off-reservation operation of a vehicle in violation of Kan. Stat. Ann. § 8-142 (2001) by Respondent's tribal members. Pet. App. 5. There is no evidence in the record that the State attempted in any manner to regulate or prohibit the tribal activity of issuing tribal plates and titles.

Further, in *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001), *vacated*, 271 F.3d 910 (9th Cir. 2001) (hereinafter, *Cabazon II*), the County's regulation of the Tribe's use of emergency light bars occurred entirely off reservation and, the Ninth Circuit concluded that *White Mountain Apache's* balancing test was inapplicable.[3] Instead, the Ninth Circuit applied the standard articulated in *Mescalero Apache Tribe*. The Ninth Circuit concluded that under *Mescalero*, a nondiscriminatory state law applied to Indian activities outside a tribe's

[3] On July 18, 2001, while the Tribe's petition for rehearing in *Cabazon II* was pending, the Tribe and the BIA Office of Law Enforcement Services entered into a Deputation Agreement. In light of the Deputation Agreement, the *Cabazon II* panel withdrew its opinion and remanded for the district court to consider the Deputation Agreement's impact on the issues in this case. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 696 (9th Cir.2004). Though withdrawn, the Ninth Circuit's original reasoning in *Cabazon II* is still sound.

reservation boundaries is federally preempted only where the state law is contrary to "express federal law." *Id.* at 148-49. Finding no express law to the contrary, and concluding that it was "undisputed that California's Vehicle Code is nondiscriminatory state law," the *Cabazon II* Court held that the Vehicle Code's limitation on the use and display of emergency light bars to "authorized emergency vehicles," applied to the Tribe's police vehicles traveling on public highways. 249 F.3d at 1105. Similarly here, there is no express federal law contrary to Kan. Stat. Ann. § 8-142 (2001), nor is there any evidence that this Kansas Statute is discriminatory.

The Court of Appeals below noted the conflict between the circuits, stating it was in disagreement with the Ninth Circuit's conclusion that, under *Mescalero Apache Tribe,* balancing of interests is improper when a State regulates and administers its laws off-reservation, even against Indians and even if Indian interests may be implicated. Pet. App. 10. The Court of Appeals' repudiation of the rule of *Mescalero Apache Tribe* requiring "express federal law" as a prerequisite to off-reservation preemption is startling.

States have a strong interest in maintaining their authority to regulate both Indians and non-Indians off reservation. *White Mountain Apache* is a test of general application on the reservation to the activities of non-Indians; it applies to both tax *and non-tax matters. See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001). The decision below logically could be read to require the balancing of state, federal, and tribal interests with regard to *any* activity of an Indian off-reservation. States have never been subjected to divestment of their regulatory authority off-reservation through the *White Mountain*

Apache test, and such an extension as unfounded and illegitimate.

In sum, the Tenth Circuit's decision creates a palpable conflict between authority from this Court and the Ninth Circuit for purposes of S. Ct. R. 10(a).

Finally, the pernicious effect of the Court of Appeals' reasoning on the States' administration of their motor vehicle laws must be emphasized. The Court of Appeals' decision erroneously exposes the States' system of highway safety and management and regulation of the thousands upon thousands of vehicles on the State's highways to unwarranted vulnerability as a practical matter. Indeed, under the Court of Appeals' rationale, any off-reservation state regulatory activity is vulnerable. For example, if a tribe decides to issue a license to its members for any manner of activities (*e.g.*, drivers licenses, hunting or fishing licenses, licenses to transport hazardous materials, etc.), the rationale of the decision below would operate as a *per se* preemption of state law, even off-reservation. Further, if a tribe places a business operation (*e.g.*, a hotel, restaurant and bar complex) off-reservation and "licenses" it under tribal code, then, under the rationale of the decision below, state statutes regulating health, safety, liquor sales, etc. would be preempted. In any suit brought by a tribe involving off-reservation state regulation, tribes will presumably be able to bring all manner of claims alleging that state action off-reservation against Indians or non-Indians has an adverse economic or political effect on the tribe which, *inter alia*, "harms" the tribe, and thus preempts the state's sovereign, off-reservation authority. This too is untenable under our system of federalism.

Thus, reversing the Court of Appeals' error in this case is not just a nicety of legal reasoning, but a practical necessity. Kansas respectfully requests that the Court reverse the Court of Appeals' erroneous holding on this issue.

II. The Perpetual Uncertainty in Lines of Demarcation and Lack of Meaningful, Clear Guidance That Is Critical to States, Dictates That the *White Mountain Apache* Balancing Test Be Replaced with a Preemption Analysis Based on the Principle that Indian Immunities Are Dependant Upon Congressional Intent.

In order to properly administer their highway programs, provide for the integrity of vehicle titles, and promote public safety on its highways for their citizens, States need clarity in jurisdictional limitations, certainty in rules of application and consistency of results. The balance-of-interests test is seriously deficient on all counts.

It has become abundantly clear that the *White Mountain Apache* interest-balancing test laid down almost 25 years ago is simply unworkable. Justice (now Chief Justice) Rehnquist's dissent in *Colville* was prescient in this regard. The judiciary has become log-jammed with protracted litigation in which neither side can, nor will, acknowledge that the balance of interests favors the other. This flight to litigation is encouraged by the balance-of-interests test itself, which has devolved into a case-by-case, highly subjective test whose results are plainly unpredictable. As previously noted, no circuit or state supreme court has used the *White Mountain Apache* balance-of-interests test to strike a lawful, nondiscriminatory State law imposed off-reservation. In light of *Mescalero*

Apache, which allows States to impose nondiscriminatory laws off-reservation even against Indians, the decision by the Court below to use the *White Mountain Apache* balance-of-interests test to strike a State law administered off-reservation can only be characterized as dramatically unpredictable as well as unprecedented.

More to the point, the fact that States must now ascertain whether their off-reservation regulation may have an effect on a tribe is plainly impracticable. For example, the test requires States to make determinations of off-reservation activity prior to the activity even occurring on facts that a State cannot possibly know and whose potential effects are unknown. This simply exceeds the capability of any official or institution. The only way that a State will be able to "know" about transactions or activities occurring off-reservation and the effects on tribes is when a tribe sues the State alleging harm. Thus, the real world result of the balance-of-interests test has become a nearly one hundred precent guarantee of protracted litigation. A test should be designed to mitigate conflict, not be the catalyst for litigation. This concern was rightly noted by Chief Justice Rhenquist in *Colville*, and has become all the more urgent today.

By way of example, a paradigm of the multi-layered complexity attendant to the *White Mountain Apache* analysis in a taxation context is *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on-reservation on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

In our case the following facts favor preemption:

1. The fee is held by the United States in trust for the Tribe.

2. The Tribe has furnished the site for the Hotel.

3. The Tribe has ownership of the Hotel, its facilities, and all improvements.

4. The Tribe has a residual interest in the assignment of the lease.

5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.

7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.

8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The

manager of the Hotel was not aware of any employee from the Tribe.

2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.

3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.

4. The Tribe receives only a guaranteed 1-1/4 percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."

5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

   (a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.

   (b) The law governing liens . . . and other security instruments such as the mortgages by which the Hotel is financed.

   (c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, similarly to the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's " 'active

role in *generating activities of value* on its reservation[;]'" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services 'critical' to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting).

While *Yavapai-Prescott* is a tax-related case, it clearly illustrates the conundrum facing states. The permutations of facts and circumstances in any given situation are legion, indeed, incalculable. Any variation of fact or circumstance, no matter how slight, could, in some court's mind, tip the "balance" in the opposite direction. It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and administrators with no real guidance in attempting to conform their actions with applicable federal common law.

States simply cannot administer their statutes effectively when one party can change circumstances or create novel theories that ostensibly "shift" the balance against the State. States need a clear, bright-line test. *Chickasaw Nation*, 515 U.S. 450, 460 (1995). Balancing simply does not provide it. The appropriate approach is instead to follow a straightforward standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax may ultimately be borne by the Government. *See*

Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37-38 (1999).

The standard imposed by the Court of Appeals upon States now is that because the United States has a generalized interest in tribal viability, State regulation, even if imposed off-reservation, that may have an effect on tribes, is void. The Court of Appeals cites the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2000); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2000); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2000); *see also* Presidential Proclamation 7500, 66 Fed.Reg. 57641 (Nov. 12, 2001); and, Exec. Order 13175, 65 Fed.Reg. 67249 (Nov. 6, 2000). Pet. App. 17. Such a categorical bar to State taxation has been rejected by this Court. *Colville*, 447 U.S. 134, 154-56 (1980).

Moreover, nowhere within these statutes, proclamations or executive orders has off-reservation state authority been preempted, nor has Congress provided "super-sovereign" status to tribes to preempt off-reservation state law by issuing their own license plates and vehicle titles. Where is the congressional intent to preempt state authority in this area? Where are the federal interests articulated in the statute that when a tribe issues its own license plates, off-reservation state law is preempted? None exist. Not only do none of these statutes, proclamations or executive orders address, even remotely, motor vehicles, titles or license plates, none of them purport to preempt State authority off-reservation or to extend tribal authority beyond its reservation boundaries.

The Court of Appeals could only reach its conclusion by contorting these generalized federal interests to make the circumstances here fit the balance-of-interests test as applying to off-reservation State regulation and enforcement, because there is no controlling authority to support the Court of Appeals' leap in logic. The balance-of-interests test itself has predestined this outcome because it provides no discernible limitation on lower courts to avoid such judicial legislation. The test itself has created uncertainty and confusion in the lower courts resulting in conflicting decisions emanating from facts that at their core are not so vastly different. This is not the purpose of a precedent that is supposed to bring clarity and applicability to future, analogous cases. *Chickasaw Nation*, 515 U.S. at 459-60. While there are many words that could be used to describe the balance-of-interests test, predictability is not one of them.

Kansas asks this Court to abandon the balance-of-interests test in favor of a straight, federal preemption standard based on congressional intent similar to the standard recognized in *United States v. New Mexico*. Such an approach provides clear guidance, clear lines of demarcation and clear, readily applicable results.

Adoption of a federal preemption based on congressional intent such as expressed in *New Mexico* will recognize the States' compelling interest in a predictable sphere of authority. This approach, lastly, comports in rationale and result with *Hicks* and its predecessors.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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United States Court of Appeals
Tenth Circuit

March 25, 2005

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION,

Plaintiff-Appellant,

v. No. 03-3322

JOAN WAGNON,
Secretary of the Kansas Department
of Revenue, et al.

Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 99-CV-4136-JAR)

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David Prager, III, Tribal Attorney, Prairie Band Potawatomi Nation, Mayetta, KS, for Plaintiff-Appellee.

Before *McCONNELL* and *McKAY*, Circuit Judges, and FRIOT, District Judge.*

---

* The Honorable Stephen P. Friot, United States District Judge for the Western District of Oklahoma, sitting by designation.

McKAY, Circuit Judge.

Plaintiff Prairie Band of Potawatomi Indians ("the Tribe"), a federally recognized Kansas Indian tribe, filed this action against Kansas state officials seeking to have its motor vehicle registrations and titles recognized by the State. The district court granted a preliminary injunction in favor of Plaintiff, affirmed by this court on June 25, 2001, prohibiting enforcement of the State motor vehicle registration and titling laws with respect to vehicles registered and titled by the Tribe. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (2001) ("*Prairie Band I*"). On August 6, 2003, following the outline and guidance provided by this court in *Prairie Band I*, the district court granted Plaintiff's motion for summary judgment, permanently enjoining Defendants from further application and enforcement of Kansas' motor vehicle and titling laws against Plaintiff and any persons who operate or own a vehicle properly registered and titled pursuant to tribal law. On October 8, 2003, the district court denied Defendants' motion to reconsider. Defendants appeal to this court.

The district court opinions and our opinion in *Prairie Band I* provide a comprehensive history of the dispute which will not be repeated in detail here. The relevant facts are as follows. On March 16, 1999, in order to address the increase in motor vehicle traffic on the reservation, the Tribe enacted the Prairie Band Motor Vehicle Code ("PBMVC") to "implement reasonable rules, regulations, and penalties essential to maintaining a safe and efficient transportation system" on the reservation. Aple. Supp.App., Vol. I, at 8 (PBMVC Ch. 17-1). Pursuant to the PBMVC, tribal registrations and titles are required for all vehicles owned by Tribe members who reside on the

reservation and for all tribal government vehicles. *Id.* at 56 (PBMVC Ch. 17-10-1(B)). The PBMVC requires those seeking tribal registrations to surrender any certificate of title issued by another jurisdiction, including Kansas. The tribal certificates of title are of banknote quality and resemble titles of other jurisdictions, and the license plates conform to the national standards for visibility, design, and size. *Id.* at 80. Prior to the enactment of the PBMVC, the Tribe's members complied with Kansas' motor vehicle code which requires that all vehicles that operate in Kansas be registered and titled by the State. *See* Kan. Stat. Ann. § 8-142 (2001).[1] Nonresidents who operate vehicles in Kansas are not considered violators if they are

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[1] Section 8-142 provides in pertinent part:

> It shall be unlawful for any person to commit any of the following acts and except as otherwise provided, violation is subject to penalties provided in K.S.A. 8-149, and amendments thereto:
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> *First:* To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, and amendments thereto, which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the division for the current registration year, including any registration decal required to be affixed to any such license plate pursuant to K.S.A. 8-134, and amendments thereto, subject to the exemptions allowed in K.S.A. 8-135, 8-198[,] and 8-1751a, and amendments thereto.
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> *Second:* To display or cause or permit to be displayed, or to have in possession, any registration receipt, certificate of title, registration license plate, registration decal, accessible parking placard or accessible parking identification card knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

Kan. Stat. Ann. § 8-142 (2001).

properly registered and titled in the state of their residence provided that their state grants reciprocal recognition to Kansas' registrations and titles. *See* Kan. Stat. Ann. § 8-138a (2001).[2]

At this point, three vehicles have been issued tribal registrations and titles. Aple. Supp.App., Vol. I, at 81. Approximately 300-400 vehicles will be titled under the PBMVC if the system is allowed to proceed. Plaintiff submits that it is necessary for privately and tribally owned vehicles to occasionally leave the reservation for various reasons. *Id.* at 81. In the absence of an injunction, it is Defendants' position that drivers of tribally licensed vehicles will be in violation of Kansas state law for failure to present a properly registered vehicle.[3] Because Kansas

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[2] Section 8-138a states:

> The provisions of this section shall apply only to the nonresident owner or owners of any motor vehicle constructed and operated primarily for the transportation of the driver or the driver and one or more nonpaying passengers. Such nonresident owners, when duly licensed in the state of residence, are hereby granted the privilege of operation of any such vehicle within this state to the extent that reciprocal privileges are granted to residents of this state by the state of residence of such nonresident owner.

Kan. Stat. Ann. § 8-138a (2001). As we noted in *Prairie Band I*, section 8-138a requires recognition of registrations and titles issued by Indian tribes that reside outside the State of Kansas. 253 F.3d at 1238 n. 2 (citing *State v. Wakole*, 265 Kan. 53, 959 P.2d 882, 885-86 (1998), for the proposition that since the State of Oklahoma recognized an Oklahoma tribe's license plates as valid for use on Oklahoma highways, a vehicle with the Oklahoma tribe's license plate was "duly licensed" pursuant to Kan. Stat. Ann. § 8-138a).

[3] Defendants have taken the position that since the Tribe is within the State of Kansas, the reciprocal-privileges exception in section

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does not recognize registrations and titles issued by the Tribe as valid, prior to this litigation and the issuance of the preliminary injunction three citations were issued by the State for persons driving tribally registered vehicles off the reservation.

The issues on appeal are whether the district court: (1) abused its discretion in issuing the permanent injunction; (2) erred in its ruling that defendants were not entitled to sovereign immunity; and (3) erred in ruling that the relief requested by the Tribe (a permanent injunction) did not violate the Tenth Amendment. Plaintiff argues that, in light of our decision in *Prairie Band I* affirming the district court's grant of a preliminary injunction, certain issues should not be readdressed based on the law of the case doctrine.

The law of the case doctrine sets forth the fairly straightforward legal and pragmatic principle of certainty throughout the proceedings of a case: "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). However, courts are quick to recognize the flexibility of the rule and are permitted to overturn erroneous rulings as the underlying policy of the rule is one of efficiency, *Major v. Benton,* 647 F.2d 110, 112 (10th Cir.1981) (citations omitted), not restraint of judicial power, *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Indeed, the presence of new evidence or subsequent contradictory precedent or a

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8-138a does not apply to the Tribe because Tribe members are not non-residents.

determination that the previous ruling was clearly erroneous are legitimate bases for not applying the law of the case doctrine. *Major,* 647 F.2d at 112. Relying on the law of the case doctrine, Plaintiff delineates the following issues as ones that we need not reconsider: (1) whether we have subject matter jurisdiction over the instant action; (2) whether Plaintiff has standing; (3) whether an Article III case or controversy exists; and (4) whether the balancing test outlined in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), must be applied to this case. Aple. Br. at 15-16. Neither the order granting Plaintiff's motion for summary judgment nor Defendant's appeal therefrom specifically addresses the first three issues Plaintiff alleges fall under the law of the case doctrine.[4]

We review *de novo* a district court's grant of summary judgment, applying the same legal standard employed by the district court, to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d

[4] The District Court Order does mention that, to the extent Defendants are attempting to argue that there is no Article III case or controversy, that issue was already "decided by the Tenth Circuit." Aplt. Am.App., Vol. IV, at 1014-15 (District Court Order, August 6, 2003); *Prairie Band I,* 253 F.3d at 1240-42. Defendants do not address this point in their brief. Defendants also do not specifically argue on appeal that our holding in *Prairie Band I* that the Tribe has standing was incorrect. In *Prairie Band I,* we stated that "[t]he state's refusal to extend recognition, therefore, causes an obvious harm to the tribe: interference with or infringement on tribal self-government." 253 F.3d at 1242; Aplt. Am.App., Vol. IV, at 1015 (District Court Order, August 6, 2003). Defendants do make a conflated Eleventh Amendment sovereign immunity argument that confuses several of these issues with the *Ex parte Young* exception. We address that issue later in this opinion.

1172, 1175 (10th Cir.2001); *Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 583 (10th Cir.2000). The first issue on appeal is whether the district court abused its discretion in issuing the permanent injunction. *SEC v. Pros Int'l, Inc.,* 994 F.2d 767, 769 (10th Cir.1993) ("[W]e review the district court's grant or denial of a permanent injunction for an abuse of discretion."). A district court abuses its discretion when it issues an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Coletti v. Cudd Pressure Control,* 165 F.3d 767, 777 (10th Cir.1999) (citation omitted).

For a party to obtain a permanent injunction, it must prove: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175, 1180 (10th Cir.2003) (citations omitted). This standard is remarkably similar to the standard for a preliminary injunction. The only measurable difference between the two is the requirement of actual success on the merits. (For a preliminary injunction, only a substantial likelihood of success on the merits must be established.) *See Prairie Band I,* 253 F.3d at 1246 (citing *Federal Lands Legal Consortium v. United States,* 195 F.3d 1190, 1194 (10th Cir.1999)). Because we already considered and determined in *Prairie Band I* that the Tribe will suffer irreparable harm if the injunction is not issued, that the balance of the harms favors the Tribe, and that the granting of the injunction will not adversely affect the public interest, it follows that the only real controversy which this Court must decide is

whether the district court abused its discretion in ruling that the Tribe has succeeded on the merits.[5]

This dispute involves federal preemption. Specifically, "[t]he issue presented in this case . . . is whether the doctrines of federal preemption and Indian sovereignty act as barriers to the State's exercise of its regulatory power to title and register vehicles belonging to either the [Tribe] or its members who reside on the reservation." *Prairie Band of Potawatomi Indians v. Wagnon,* 276 F.Supp.2d 1168, 1184 (D.Kan.2003). It is not, as Defendants assert, whether the Tribe "has the power to regulate the activities of state officials enforcing state law off reservation." Aplt. Br. at 13. It is not "whether [the Tribe] can 'order' state officials not to issue citations to tribally registered vehicles." *Prairie Band of Potawatomi Indians v. Richards,* No. 99-4136-DES, 2002 WL 215996, at *3 (D.Kan. Feb. 8, 2002); Aplt. Am.App., Vol. I, at 167. It is not whether "State law[s] off reservation [are] subservient to tribal ordinances." Aplt. Br. at 12. Instead, "[t]he real issue is whether defendants' actions interfere with plaintiff's sovereignty or ability to self-govern to the extent that the State's actions must be preempted *by federal law,* when some of defendants' actions may occur off the reservation." Aplt. Am.App., Vol. IV, at 1018 n. 78 (emphasis added).

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[5] Defendants made a bald claim on appeal that the second, third, and fourth permanent injunction factors were applied incorrectly by the district court, *see* Aplt. Br. at 8, but provided no argument in support of this assertion. We will not craft a party's argument for him on appeal. *United States v. Graham,* 305 F.3d 1094, 1107 (10th Cir.2002); *see also Perry v. Woodward,* 199 F.3d 1126, 1141 n. 13 (10th Cir.1999); *Brownlee v. Lear Siegler Mgmt. Servs. Corp.,* 15 F.3d 976, 977-78 (10th Cir.1994); *Primas v. City of Okla. City,* 958 F.2d 1506, 1511 (10th Cir.1992); *American Airlines v. Christensen,* 967 F.2d 410, 415 n. 8 (10th Cir.1992).

Defendants' attempt to recharacterize the dispute as one of tribal control over the State is misguided and improperly confuses the issue before the court. Most of Defendants' brief rehashes arguments that were presented to and rejected by this court in *Prairie Band I.* In *Prairie Band I,* we provided the district court with the appropriate legal framework within which to view this case. Following our direction, the district court correctly recognized that in order for the Tribe to succeed on the merits of its claims it had to "demonstrate that the state laws at issue [were] preempted by federal law or that the doctrine of Indian sovereignty in conjunction with federal preemption bars the State from enforcing its title and registration laws, as they apply to plaintiff." Aplt. Am.App., Vol. IV, at 1020 (District Court Opinion, August 6, 2003). The district court then applied the *Bracker* balancing test in evaluating the respective federal, state, and tribal interests. 448 U.S. at 151, 100 S.Ct. 2578; Aplt. Am.App., Vol. IV, at 1021 n. 93. The district court's analysis is not only thoughtful but it also adequately and properly addresses all of the arguments raised by Defendants in this appeal. Defendants' main argument on appeal is that the district court improperly applied the *Bracker* balancing test because the tribal titling and licensing inherently implicates off-reservation interests when Tribe members drive off the reservation onto State roads. Defendants do not dispute that the Tribe has jurisdiction to register and title tribal vehicles; however, once the tribally registered vehicles leave the reservation, Defendants contend that Kansas can choose not to recognize these vehicles as validly registered and titled pursuant to State law. This is a difficult case because of the transitory nature of motor vehicles. No one disputes the Tribe's authority to apply the PBMVC on reservation land; the dispute arises solely

because the tribally tagged vehicles must sometimes leave the reservation and drive on Kansas' roads. Defendants cite to *Mescalero Apache Tribe v. Jones* for the principle that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Aplt. Br. at 22 (quoting 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). As noted above, we squarely addressed this issue in *Prairie Band I* and held that the *Bracker* balancing test applies in this case. 253 F.3d at 1255. We stated "that preemption in the context of federal Indian law is about the careful balancing of tribal, federal, and state interests."[6] *Id.* In so ruling, it would appear that it is the

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[6] In *Prairie Band I* we stated:

> We disagree with the Ninth Circuit's conclusion that, under *Mescalero,* no balancing of interests takes place once the tribal activity takes place off-reservation. *See Cabazon Band of Mission Indians v. Smith,* 249 F.3d 1101, 1106 (9th Cir.2001) [hereinafter *Cabazon II*] ("*White Mountain's* preemption analysis is not applicable to off-reservation activity."). Rather, we believe that the dissent in *Cabazon II* had the better of it. *See id.* at 1112 (Browning, J., dissenting) (noting that the *Mescalero* principle "was only a generality and not carved in stone on Mt. Sinai"; also noting that the Supreme Court has not restricted the balancing-of-interests test to cases in which the tribal activity is solely on-reservation). That is, we read *Mescalero* to say that, if the tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state (assuming there is no express federal law to the contrary).

253 F.3d at 1255 n. 9.

> Recently, in *Cabazon Band of Mission Indians v. Smith,* 388 F.3d 691, 698 (9th Cir.2004) (*Cabazon IV*), the Ninth Circuit reaffirmed their position that, because the tribal activity at issue takes place both on and off the reservation, *Bracker* does not apply. In *Cabazon IV,* the court instead applied

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law of this case that the *Bracker* balancing test was appropriately applied by the district court. However, as mentioned above, the law of the case doctrine does not prohibit reexamination of that issue.

While we do not agree with the Ninth Circuit's complete rejection of *Bracker,* the *Cabazon IV* analysis regarding the discriminatory effect of the State's motor vehicle code is sound. In *Prairie Band I,* we stated that "arguably the application of the state motor vehicle laws was *not* nondiscriminatory." 253 F.3d at 1257 n. 12. Kansas already recognizes tribal plates from other jurisdictions and foreign nations without any record-supported harm. Certainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them.

The propriety of the district court's application of the balancing test is a critical issue on appeal in light of Defendants' assertion that *Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), which was decided by the Supreme Court the same day as *Prairie Band I,* has so "altered the legal landscape [] that [our] opinion in

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Mescalero to invalidate California's application of its vehicle code to prohibit tribal police vehicles from displaying emergency light bars off the reservation. *Id.* at 701. Relying on *Mescalero's* statement that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State," the court determined that applying the light bar prohibition to Indian police vehicles was not a "nondiscriminatory application of state law" because other emergency vehicles, including those of bordering states, were not subject to the same prohibition. *Id.* at 698, 701.

Prairie Band [I] no longer control[s]." Aplt. Br. at 4. Indeed, if we find Defendants' argument persuasive, it is possible that *Hicks* is sufficiently contradictory authority to require a serious reevaluation of the applicability of the *Bracker* balancing test.

The thrust of Defendants' argument is that the district court's decision to grant the permanent injunction was done in conscious disregard of *Hicks,* which Defendants assert applies to and controls the instant case. In support of this argument, Defendants assert that we determined incorrectly in *Prairie Band I* "that a tribe may exercise its regulatory jurisdiction off reservation and oust the state from its Constitutionally guaranteed right as sovereign to make its own laws and be ruled by them on State land." Aplt. Br. at 11. *Prairie Band I* did not so hold. Instead, as stated above, we addressed "whether defendants' actions interfere with plaintiff's sovereignty or ability to self-govern to the extent that the State's actions must be preempted *by federal law,* when some of defendants' actions may occur off the reservation." Aplt. Am.App., Vol. IV, at 1018 n. 78 (emphasis added).

In *Hicks,* the Supreme Court, in reaching its ultimate holding that a tribal court did not have "jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime," concluded "that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.'" 533 U.S. at 357, 364, 121 S.Ct. 2304. Defendants have attempted to characterize *Hicks* as making a broad statement that any time a tribal ordinance secondarily affects non-members off the

reservation, state law trumps. Defendants rely on the following passage from *Hicks* to support their sweeping conclusion that whenever conduct secondarily affects nonmembers off the reservation, state law controls:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Bracker, supra,* at 144, 100 S.Ct. 2578. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes.* In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax, 447 U.S., at 151, 100 S.Ct. 2069. *Hicks,* 533 U.S. at 362, 121 S.Ct. 2304 (internal quotations omitted). However, the issue in *Hicks* was "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355, 121 S.Ct. 2304.

Hicks addressed tribal interference with legitimate state law enforcement activity on reservation. It did not address, or discuss at all, the issue of when a valid tribal ordinance on reservation has a limited secondary effect off the reservation. We do not necessarily disagree with

Defendants' statement that the "[*Bracker*] balancing of interests test [is inapplicable] when the activity sought to be regulated by the State takes place off reservation land." Aplt. Br. at 8. However, the activity at issue in this case, licensing and titling of vehicles, takes place on the reservation. Even though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons, "we deem it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation." *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 (9th Cir.1994).[7]

The entire *Hicks'* opinion falls under the umbrella of "Indian tribes' regulatory authority over nonmembers," 533 U.S. at 358, 121 S.Ct. 2304, whereas our case involves federal preemption of a state's exercise of its regulatory power. To be sure, one could argue that these issues are two sides of the same coin. However, Supreme Court and Tenth Circuit precedent make it clear that the two sides of this coin require analysis under different legal frameworks. In cases where an Indian tribe is attempting to assert its authority over non-members, courts are required

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[7] In *Prairie Band I* we stated that

> the tribal activity in *Mescalero* – the operation of a ski resort located outside reservation land – was conducted clearly and exclusively beyond the reservation, thus heightening the interests of the state. The same, however, cannot be said of the activity in the instant case: Here, the activity conducted by the tribe was the registration and titling of vehicles; this activity occurred within the reservation, not beyond, although as an ancillary consequence driving outside the reservation did occur.

Prairie Band I, 253 F.3d at 1255.

to apply *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and its progeny. *Hicks* falls squarely within the principles developed by the *Montana* line of cases. *Hicks,* 533 U.S. at 358, 121 S.Ct. 2304. In cases which concern tribal authority over its own members, courts are required to apply the principles articulated in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), and its progeny. This is true even when non-members are secondarily affected. *Prairie Band I,* 253 F.3d at 1256 n. 11. In these cases, when state interests are secondarily affected, *Bracker* must be applied to ascertain and balance all parties' interests. *Id.* at 1255, n. 9

As we noted in *Prairie Band I,* the issues presented in this case require the interpretation and application of the principles articulated by *Mescalero,* not application of *Montana* – which the Supreme Court focused on in rendering its decision in *Hicks.* Since we hold that *Hicks* does not change the application of the *Bracker* balancing test in this case, we must next address whether the district court abused its discretion in balancing the interests of the parties.

The balancing test is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *Bracker,* 448 U.S. at 145, 100 S.Ct. 2578. Motor vehicle titling and registration is a traditional government function. *Prairie Band I,* 253 F.3d at 1250; *see also Queets Band of Indians v. Washington,* 765 F.2d 1399, 1403 (9th Cir.1985) ("Indian tribes possess the sovereign authority to

license and register tribal vehicles."), *vacated as moot,* 783 F.2d 154 (1986).[8] Because vehicle registration involves a traditional government function, tribal issues are heightened. The Tribe has a significant interest in regulating motor vehicles on its reservation through the comprehensive PBMVC and through the issuance of tribal registrations and titles.

The PBMVC is a comprehensive code which applies to all vehicles that are driven on the reservation. The stated purposes of the PBMVC are:

> 1) tribal control and regulation of motor vehicle traffic on the reservation, 2) orderly registration and licensing of vehicles owned by tribal members and located on roads and highways within the reservation, 3) assisting law enforcement officers in identifying owners of the vehicles, 4) prevention of fraudulent transfers, theft, and conversion, 5) providing revenue to the Nation through taxation and fees, and [6)] allowing for the orderly transfer of title and other transactions involving vehicles.

Aplt. Am.App., Vol. IV, at 1024 (District Court Opinion, August 6, 2003); Aple. Supp.App., Vol. I, at 55-56 (PBMVC Ch. 17-10-1). If Defendants continue to enforce State motor vehicle registration and titling laws to the exclusion of tribal motor vehicle registration and titling, the Tribe's "motor vehicle code will be effectively defunct." Aplt. Am.App., Vol. IV, at 1026 (District Court Opinion August 6, 2003); *Prairie Band I,* 253 F.3d at 1251; *see also Red*

[8] The Ninth Circuit's decision was withdrawn at the request of the parties in anticipation of legislation that would render the controversy moot. However, the reasoning remains persuasive.

Lake Band of Chippewa Indians v. State, 311 Minn. 241, 248 N.W.2d 722, 727-28 (1976); *Queets,* 765 F.2d at 1409.

The Tribe's interests in this case are linked with strong federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance. "[W]hile there is no federal legislation addressing tribal vehicle registrations and titling, there is an obvious federal interest in the [Tribe]'s right to self-government." Aplt. Am.App., Vol. IV, at 1022 (District Court Opinion, August 6, 2003). These federal goals stem from various Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2000); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2000); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2000); *see also* Presidential Proclamation 7500, 66 Fed.Reg. 57641 (Nov. 12, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Exec. Order 13175, 65 Fed.Reg. 67249 (Nov. 6, 2000) ("[We] recognize[ ] the right of Indian tribes to self-government and support[ ] tribal sovereignty and self-determination."); *Bracker,* 448 U.S. at 143, 100 S.Ct. 2578 (there is "a firm federal policy of promoting tribal self-sufficiency and economic development"); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 155, 100 S.Ct. 2069, 65 L.Ed.2d 10 (noting that there are "varying degrees [of] congressional concern with fostering tribal self-government and economic development").

Against these strong tribal and federal interests, the sole interest asserted by Defendants is that of public safety. Oral Arg. Transcript, September 29, 2004 (Defendants conceded at oral argument that "[t]here's no issues

of revenue in this instance" and that the sole interest was that of safety and protection of a state's police powers.). For purposes of this appeal, it is accepted that tribally titled and registered vehicles will have to leave the reservation and travel on Kansas highways. However, Kansas' sovereignty and public safety interests do not automatically trump the Tribe's interest in self-governance. We already considered and addressed Defendants' asserted safety concerns in *Prairie Band I* and determined that those safety concerns were likely exaggerated. 253 F.3d at 1251-52. The district court further addressed Defendants' safety concerns and determined that "the balance tips in favor of the [Tribe]." Aplt. Am.App., Vol. IV, at 1031 (District Court Opinion, August 6, 2003). We further note that Kansas recognizes license plates from other states, Canada, and Mexico, and tribally issued tags from other jurisdictions, including Minnesota and Oklahoma, without any record-supported safety concerns. "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville,* 447 U.S. at 156, 100 S.Ct. 2069 (1980) (citation omitted). While off-reservation activity might "*generally* tip[] the balancing test in favor of the state," *Prairie Band I,* 253 F.3d at 1255 n. 9, the off-reservation ancillary effects of tribal registration and titling carry no such weight. Without a more concrete and uninflated interest than the unsupported safety concerns in the record, we cannot hold that the State's interests in regulating the registration and titling of all vehicles driven on Kansas highways overcomes the strong tribal interest in self-governance through tribal registration and titling.

Balancing the federal and tribal interests against the State's interests in this case, we cannot say that the district court abused its discretion granting a permanent injunction. The district court, following our outline in *Prairie Band I,* provided a thorough discussion of the federal, tribal, and state interests in this case. "[I]f the State does not recognize tribal registrations and titles, there will be no tribal registrations and titles and the [Tribe] will be unable to effectively pursue the goal of self-government." Aplt. Am.App., Vol. IV, at 1031 (District Court Opinion, August 6, 2003). Balanced against the amorphous and unsupported safety concerns asserted by the State, the Tribe's interest in self-governance by enacting and enforcing its own vehicle registration and titling laws must prevail.

The concurring ~~opinion~~ invites us to abandon the *Bracker* balancing analysis and align ourselves with the reasoning of the Ninth Circuit in *Cabazon Band of Mission Indians v. Smith,* 388 F.3d 691 (9th Cir.2004) (*Cabazon IV*) (applying *Mescalero* discrimination analysis instead of *Bracker*). In rejecting the balancing approach, the concurrence makes much of the "incommensurate interests" at stake in this case stating that "[i]t reminds me of asking whether a stick is longer than a rock is heavy." *Id.* This analogy misses the point. What we are doing here is not assessing the stick's length versus the rock's weight, but their value as weapons. We are doing what we routinely do as judges – assessing normative values to varying interests and weighing one against the other. In applying a balancing test, we have to weigh in context. We measure the normative social values which we assign and reconcile them against one another. For an example, we look to the numerous exceptions we have created to the Fourth

Amendment. We assign a value to a police officer's safety, and we assign a value to the Fourth Amendment protections of the party who is the subject of a search. These are as unlike each other as rocks and sticks, but still we weigh them against each other. Another example is in the context of trial court error. In our review, we weigh the error against the value of another body of evidence. In so doing, we often conclude that the error is harmless. We even make such distinctions as harmless beyond a reasonable doubt. This challenge is the essence of judicial function. A unique challenge certainly does not divest us of our responsibility to consider and reconcile competing interests to determine which is of greater importance. We agree with the concurring opinion that "the argument is really about revenue." *See id.* The balance can be characterized as one of revenue and control. The concurrence's discrimination discussion effectively proves that the State's claim of safety is a pretense and that, to them, this case is all about money. The Tribe has less resources than the State. It subsists on the land where it was forced to go by the Government. On its reservation, the Tribe is using its own resources to effectively self-govern and maintain its viability. Tribal registration is one such available way to do so. The State apparently resents that it has lost some amount of control over the Tribe – and that it has lost some revenue.

We do not disagree with the concurrence's discrimination analysis. However, while "discrimination" may very well be an additional appropriate analysis in the instant case, it was not tried on that ground. Additionally, neither party briefed or argued the discrimination issue or provided any reason (other than *Nevada v. Hicks*) to abandon the sound *Prairie Band I* reasoning. More importantly, the

theory on which the case was tried is fully supported by the cases. The *Bracker* analysis is more in line with the Congressional mandate to encourage tribal self-government and economic development. We take this mandate seriously and prefer to ground our analysis in the line of reasoning which more effectively strengthens tribal interests. It is worth noting that the concurring opinion incorrectly states that we believe that we are "bound, under principles of law of the case, by the analysis in [*Prairie Band I*]." *See id.* at 1029. Our discussion of law of the case correctly relates the principles of the doctrine. *See* Op. at 1018-19. Indeed, we specifically recognized that the principles of law of the case are flexible and that we "are permitted to overturn erroneous rulings as the underlying policy of the rule is one of efficiency . . . not restraint of judicial power." See Op. at 1018 (internal citations omitted). However, while it is true that we are not *bound* by *Prairie Band I,* it is not true that "the law of the case doctrine does not apply" merely because *Prairie Band I* dealt with a preliminary injunction. *See* Concurring Op. at 1017. The procedural posture of *Prairie Band I* does not undermine the thorough and sound discussion of *Bracker* contained within.

The next issue is whether the district court erred in its ruling that Defendants were not entitled to sovereign immunity. The Eleventh Amendment grants states sovereign immunity from suits brought in federal court by its own citizens and citizens of other states, suits by other sovereigns, and suits by an Indian tribe.[9] *Blatchford v.*

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[9] The Eleventh Amendment provides as follows:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

(Continued on following page)

Native Vill. of Noatak, 501 U.S. 775, 779-80, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). Defendants argue that the district court's issuance of a permanent injunction against them violates the Eleventh Amendment of the United States Constitution because the Tribe is effectively suing the state.

The Supreme Court carved out an exception to state sovereign immunity in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land. *Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). Defendants recognize this well-established exception which permits suits for prospective injunctive relief against state officials acting in violation of federal law. State officers sued in *Ex parte Young* cases must have "some connection" to the enforcement of the allegedly defective act. Defendants argue that because they are not

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> prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Despite the narrowness of its terms, since *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford, 501 U.S. at 779, 111 S.Ct. 2578 (internal citations omitted).

specifically empowered to enforce the state statute in question, they do not have a sufficient connection with the act that the Tribe is effectively suing the State.

Defendants are not required to have a "special connection" to the unconstitutional act or conduct. Rather, state officials must have a particular duty to "enforce" the statute in question and a demonstrated willingness to exercise that duty, *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441, which Defendants have stipulated to in this case. Aplt. Am.App., Vol. I, at 171. "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact. . . . " *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441.

Defendants, although not specifically empowered to ensure compliance with the statute at issue, clearly have assisted or currently assist in giving effect[10] to the law. Defendant Walker, as Director of Vehicles, manages vehicle registrations and titles and supervises vehicle reciprocity; Defendant Wagnon, as the Secretary of Revenue, is the State official – in connection with Defendant Walker – who decided to deny the validity of the Tribe's registrations; and Defendant Seck, as Superintendent of the Kansas Highway Patrol, enforces traffic and other laws of the State related to highways, vehicles, and drivers of vehicles. This satisfies the "some connection" requirement of *Ex parte Young*.

We agree with the district court that Defendants' assertion that because Defendants cannot change state law to remedy the Tribe's concerns – but can only enforce

[10] "To give effect" is the definition of "enforce." Webster's Third New International Dictionary 751 (1986).

the law as written – they are not proper parties rests on faulty reasoning.[11] "[T]he essence of an *Ex parte Young* action is seeking relief against the state officials who are responsible for enforcing the violative state laws, not against the state officials who drafted the violative legislation." Aplt. Am.App., Vol. IV, at 1014 (District Court Opinion, August 6, 2003).

The final issue is whether the district court erred in ruling that the relief requested by the Tribe does not violate the Tenth Amendment of the United States Constitution. Defendants claim the injunction requested by the Tribe violates the Tenth Amendment pursuant to *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), because it is effectively a mandate by Congress to recognize the Tribe's motor vehicle licenses and titles.

New York[12] and *Printz*[13] stand for the proposition that Congress cannot force states to enact or enforce federal

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[11] We are similarly unimpressed with Defendants' circular argument that section 8-138a is "unenforceable" because the statute does not contain any specific language stating how it is to be enforced. *See* Aplt. Br. at 53-56. Obviously, section 8-138a has been enforced through section 8-142 in that three citations have been issued to tribally tagged motor vehicles.

[12] In *New York,* the Supreme Court held that a provision of the Low-Level Radioactive Waste Policy Act which required states to accept ownership of waste or regulate according to Congressional instructions was inconsistent with the Tenth Amendment. 505 U.S. at 175-77, 112 S.Ct. 2408.

[13] In *Printz,* the Court struck down a portion of the Brady Act which required state officers to implement a federal regulatory program as violative of the Tenth Amendment. 521 U.S. at 933, 117 S.Ct. 2365

(Continued on following page)

regulatory programs. However, as articulated by the district court,

> *Printz* and *New York* are easily distinguishable from the facts at hand, for here the government is not attempting to compel the state to enact or enforce a federal program. Rather, plaintiff is merely asking the Court to enjoin the defendants from enforcing a *state* law that allegedly infringes on rights guaranteed to plaintiff by federal law.

Aplt. Am.App., Vol. IV, at 1016 (District Court Opinion August 6, 2003). "[T]his is a case about state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal law." *Mille Lacs Band of Chippewa Indians v. State of Minnesota,* 124 F.3d 904, 928 n. 44 (8th Cir.1997), *aff'd* 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). The permanent injunction requested by the Tribe does not mandate state participation in the enforcement of a federal statutory scheme; and, therefore, the Tenth Amendment has not been violated.

AFFIRMED.

McCONNELL, Circuit Judge, concurring.

We are asked to decide whether the State of Kansas may require members of a Kansas Indian tribe to register and title their vehicles with the State if they drive off-reservation on Kansas roads and highways. The majority decides this question by engaging in a balancing test

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("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

pursuant to *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). It balances the Prairie Band's sovereignty interests and related interests in "strong tribal economic development, self-sufficiency, and self-governance" against the State of Kansas's interest in "public safety." Op. at 1023-24. I am not sure what to think of this balance between incommensurate interests. It reminds me of asking whether a stick is longer than a rock is heavy. *Cf. Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 897, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Scalia, J., concurring). I confess I suspect the argument is really about revenue, which both sides deny.

Fortunately, no such balancing is required. Because the issue here is the regulatory authority of the State over activity by tribal members *outside the reservation,* the proper analysis is not the balancing test of *Bracker,* which applies to attempts by state governments to regulate or enforce laws on Indian reservations, but that set forth in *Mescalero Apache Tribe v. Jones:* "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *see also Nevada v. Hicks,* 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (restating these principles in the criminal context).

The majority applies the *Bracker* balancing test on the ground that "the activity at issue in this case, licensing and titling of vehicles, takes place on the reservation." Op. at 1022. I cannot agree. The State of Kansas has not attempted to project its jurisdiction over the on-reservation activities of the tribal vehicle registration and

titling office. As the majority notes, "No one disputes the Tribe's authority to apply the [Prairie Band Motor Vehicle Code] on reservation land. . . . " Op. at 1020. The sole issue in the case is whether, when tribal members drive their vehicles off reservation onto Kansas roads, this can be regulated by the State. If a tribe purported to issue "indulgences" allowing motorists to exceed the speed limit on Kansas highways, and an indulgence holder claimed that it preempted the Kansas traffic laws, no one would say the activity at issue is that of the tribal office of indulgence-granting. It is speeding on Kansas roads. For the same reason, it seems beyond question that this case is about the authority of the State over "Indians going beyond reservation boundaries," and not about an attempt by the State to regulate activities taking place within the quasi-sovereign reservation lands of the Prairie Band. *Mescalero*, 411 U.S. at 148, 93 S.Ct. 1267.

The majority adopts this approach in the apparent belief that this panel is bound, under principles of law of the case, by the analysis in *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (2001) (*Prairie Band I*).[1] *See* Op. at 1020 ("[W]e squarely addressed this issue in

[1] As an additional reason to adhere to the *Bracker* analysis, the majority states that "neither party briefed or argued the discrimination issue or provided any reason (other than *Nevada v. Hicks*) to abandon the sound *Prairie Band I* reasoning." Op. at 1026. To the contrary, appellants strenuously argued in this Court that the *Mescalero* discrimination test, rather than *Bracker* balancing test, applies to this case. Br. of Appellants, at 28-31; see also Br. of Appellees, at 24-30 (responding to the argument). To be sure, the appellants failed to offer a persuasive argument why they should *prevail* under the *Mescalero* test. As their opponents pointedly observed: "they utterly fail to account for [*Mescalero's*] indication that state laws cannot discriminate against Indians off-reservation." *Id.* at 43.

Prairie Band I and held that the *Bracker* balancing test applies in this case."); *see also id.* at 1018 (describing the argument as resting on "the law of the case doctrine"). In *Prairie Band I,* we affirmed the district court's grant of a preliminary injunction against Kansas's enforcement of its vehicle registration and titling requirements against vehicles registered and titled by the Prairie Band.

Prairie Band I was not a decision on the merits; it held only that the plaintiff's argument raised "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Prairie Band I,* 253 F.3d. at 1257 (quoting *Federal Lands Legal Consortium v. United States,* 195 F.3d 1190, 1195 (10th Cir.1999)) (ellipsis in original). That was all it took to justify the preliminary injunction. *Prairie Band I* did not, as the majority contends, hold "that the *Bracker* balancing test applies in this case." Op. at 1020. Three times – once before, once after, and once in the middle of its discussion of the likelihood of success on the merits – the *Prairie Band I* opinion stressed that the tribe only had to prove, and thus the Court only had to decide, the more limited question of whether there were serious, substantial, difficult, and doubtful questions going to the merits. *Prairie Band I,* 253 F.3d. at 1253, 1255, 1257. That was in keeping with the Supreme Court's admonition that it is improper to "equate[] 'likelihood of success' with 'success'" in the context of a preliminary injunction ruling. *University of Texas v. Camenisch,* 451 U.S. 390, 394, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* at 395, 101 S.Ct. 1830. It follows that law of the case doctrine

does not apply, and this panel is not bound. Contrary to Kansas's arguments, however, application of *Mescalero* does not result in victory for the State. The *Mescalero* standard provides that tribal members are subject to non-discriminatory state laws when they are not on reservation lands. *Mescalero,* 411 U.S. at 148-49, 93 S.Ct. 1267. The question, then, is whether Kansas's registration and titling policy is non-discriminatory. Kansas law broadly permits residents of other jurisdictions to drive their vehicles on Kansas roads if their vehicles are "duly licensed" in their own "state of residence," provided that the driver's jurisdiction permits vehicles registered in Kansas to drive on *its* roads. *See* Kan. Stat. Ann. § 8-138a. For purposes of this reciprocity statute, "'state' means a state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of a foreign country." Kan. Stat. Ann. § 74-4305. Thus, residents of Missouri, Newfoundland, or Singapore can drive on Kansas roads without being forced to register their cars in Kansas, provided each jurisdiction extends equal hospitality to Kansas drivers. Indeed, Kansas even recognizes vehicles licensed by Indian tribes from outside of Kansas. In *State v. Wakole,* 265 Kan. 53, 959 P.2d 882, 883 (1998), the Kansas Supreme Court determined that tribally registered vehicles from Oklahoma were "duly licensed in the state of residence" because Oklahoma recognized the tribal registrations.

It is undisputed in this case that the Prairie Band permits Kansas residents to drive on the reservation in vehicles registered and titled in Kansas. It thus appears that out of the universe of non-Kansas vehicles that appear on Kansas highways, the State recognizes and is

willing to accept registration and titling by the driver's jurisdiction of residence, subject only to a requirement of reciprocity, except in the case of Kansas-based Indian tribes. That is a form of discrimination.

The State argues that public safety concerns justify this differential treatment, focusing particularly on the failure of the Prairie Band to include its vehicle registrations in the national criminal database. *See Prairie Band I,* 253 F.3d at 1251. As this Court acknowledged at the preliminary injunction stage, that is a "legitimate concern." *Id.* But it raises the question: Does Kansas refuse to recognize registrations from other jurisdictions that, like the Prairie Band, are not linked to the national criminal database? If nonparticipation in the database is a genuine problem, Kansas could amend its reciprocity statute to recognize only those non-resident registrations that are included in the database, or meet other non-discriminatory public safety criteria. That would present a different case. Under the present statute, however, Kansas appears to be imposing on residents of Kansas-based reservations a requirement that it does not impose on residents of any other jurisdiction.[2]

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[2] A similar discrimination analysis might apply to any interest it may have in generating revenue by requiring members of Kansas tribes to register their vehicles with the State – an interest hinted at by the State's brief in this Court. See Br. of Appellants, at 25. According to the brief, Kansas exempts tribal members from paying personal property tax on their vehicles, but imposes a flat fee "tailored . . . to the amount of actual off-reservation use." *Id.* Kansas does not charge such a fee to other non-resident drivers. However, counsel for the State appeared to waive any consideration of the interest of the state in revenue generation from vehicle licensing, so a detailed analysis of this argument is not necessary. Oral Arg. Transcript, Sept. 29, 2004.

This analysis comports with the Ninth Circuit's approach in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir.2004). That case addressed whether California's refusal to permit tribal law enforcement vehicles to display emergency light bars was a discriminatory application of state law because California permits law enforcement vehicles from bordering states to display and operate emergency light bars within fifty miles of the border. *Id.* at 698-99. The court determined that tribal law enforcement agencies are similarly situated to the law enforcement agencies of bordering states. *Id.* at 699-700. Because there was no discernible reason for exempting law enforcement vehicles from bordering states from the emergency light bar rules, but not tribal enforcement vehicles, the court held that California was applying state law in a discriminatory manner. *Id.* at 700-01.

In this case, Prairie Band vehicles are similarly situated to vehicles licensed in jurisdictions outside of Kansas. Kansas recognizes these foreign vehicles without reference to any safety standards. By invoking a safety rationale for refusing to recognize Prairie Band vehicles, Kansas treats similarly situated parties differently. This is a discriminatory application of state law that violates the *Mescalero* standard. It is for this reason that the tribe should prevail. It is no disparagement of Congress's undoubted "mandate to encourage tribal self-government and economic development" (Op. at 1026), to recognize that in this case the tribe should prevail not on the basis of a balancing test designed for state regulation of on-reservation activities, but rather on the basis of the discrimination test applicable to state regulation of the off-reservation conduct of tribal members. I respectfully concur.

United States District Court,

D. Kansas

PRAIRIE BAND OF POTAWATOMI INDIANS, Plaintiff,

v.

Joan WAGNON, Secretary of Revenue, State of Kansas; Sheila Walker, Director of Vehicles, State of Kansas; and William Seck, Superintendent, Kansas Highway Patrol, State of Kansas, in their official capacities,[1] Defendants.

No. 99-4136-JAR.

Aug. 6, 2003.

MEMORANDUM AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DENYING DEFENDANTS' MOTION TO DISMISS, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANTS' MOTION TO STRIKE

ROBINSON, District Judge.

This matter is before the Court on defendants' motion to dismiss (Doc. 144), motion for summary judgment (Doc. 146), and motion to strike (Doc. 161), and on plaintiff's motion for summary judgment (Doc. 154). The parties have filed the appropriate responses and replies to the above motions. The Court has reviewed the parties' filings and is now prepared to rule.

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[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Ms. Wagnon is substituted for her predecessor Stephen Richards and Mr. Seck is substituted for his predecessor, Don Brownlee.

I. BACKGROUND

A. Procedural Background

Plaintiff filed its original complaint on September 14, 1999, seeking an order from the Court requiring the State to grant recognition to motor vehicle registrations and titles issued by the Prairie Band of Potawatomi Indians (hereinafter "Nation" or "plaintiff").[2] Thereafter, on October 13, 1999, the Court issued a preliminary injunction enjoining defendants from applying or enforcing the Kansas motor vehicle registration or titling laws against plaintiff and any persons who operate or own a vehicle registered or titled under plaintiff's registration code.[3] Defendants sought a stay of the injunction pending their appeal to the Tenth Circuit. The Court denied the request. However, on November 12, 1999, the Tenth Circuit granted defendants' requested stay.

Finally in an opinion dated June 25, 2001, the Tenth Circuit affirmed the Court's injunction.[4] In the interim, on September 25, 2000, United States Magistrate Judge James P. O'Hara granted plaintiff's request to amend its complaint. (Doc. 84). Plaintiff's Amended Complaint (Doc. 85) is, therefore, the controlling complaint in this matter. Also in the interim, defendant Brownlee[5] filed a motion to

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[2] The case was initially assigned to Senior District Judge Dale E. Saffels. The case has since been reassigned to the undersigned district judge.

[3] *Prairie Band of Potawatomi Indians v. Pierce*, 64 F.Supp.2d 1113 (D.Kan.1999).

[4] *Prairie Band of Potawatomi Indians v. Pierce ("Prairie Band")*, 253 F.3d 1234 (10th Cir.2001).

[5] As noted above, defendant Brownlee has since been replaced by defendant Seck.

dismiss (Doc. 67), and plaintiff filed a motion for summary judgment (Doc. 48). In light of the Tenth Circuit's decision in *Prairie Band,* plaintiff withdrew its motion for summary judgment.

Because the issues raised in defendant Brownlee's motion to dismiss were raised before the Tenth Circuit and rejected, this Court issued a show cause order on October 24, 2001, asking defendant Brownlee to show cause why his motion to dismiss should not be denied. Defendant Brownlee responded, arguing that the Supreme Court case *Nevada v. Hicks*[6] altered the legal landscape so that the Tenth Circuit's opinion in *Prairie Band* no longer controlled. The Court issued an order on February 8, 2002, rejecting defendant Brownlee's arguments and denying defendant Brownlee's motion (Doc. 100).[7]

After the Court denied defendant Brownlee's motion to dismiss, discovery ensued. Thereafter, defendants filed another motion to dismiss and a motion for summary judgment and plaintiff filed a motion for summary judgment, all of which are the subject of this Memorandum and Order.

B. Factual Background

Plaintiff is a federally recognized Indian tribe located on its Indian reservation in Jackson County, Kansas. On March 16, 1999, the Nation enacted the Prairie Band Motor Vehicle Code ("PBMVC").[8] According to the PBMVC,

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[6] 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

[7] *Prairie Band of Potawatomi Indians v. Richards,* No. 99-4136, 2002 WL 215996 (D.Kan.2002).

[8] PBMVC § 17-1 to 17-10-48.

it was enacted to "implement rules, regulations, and penalties essential to maintaining a safe and efficient transportation system" within the boundaries of the Nation's jurisdiction.[9] The PBMVC states that:

> [T]he issuance of motor vehicle license plates and registration title certificates within the boundaries of the Reservation is necessary in order for the Tribe to be able to control and regulate the ever-increasing amount of motor vehicle traffic on the reservation.
>
> . . . .
>
> It is also the purpose of the Nation in enacting this Chapter to provide for the orderly registration and licensing of vehicles owned by tribal members and located on the public roads and highways of the Nation's reservation, to assist law enforcement in identifying the owners of such vehicles, to prevent fraudulent transfers, theft, conversion, or other wrongful transactions or use of vehicles, to provide positive identification of vehicles within the service area in cases of emergency, to provide revenue to the Nation through taxation and the levying of fees and charges for the privilege of operating vehicles within the service area, to allow for the orderly transfer of title and other commercial transactions involving vehicles, including the giving of security to secure loans or other advances, and for other purposes.

In accordance with the above stated purposes, the PBMVC requires tribal registrations and titles for all vehicles owned by the Nation and for all vehicles owned by tribal members residing on the reservation. Additionally,

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[9] Pl.Ex. 2.

the code requires those seeking tribal registrations to surrender any certificate of title issued by another jurisdiction, including those issued by the State of Kansas. According to the Motor Vehicle Registrar for the Nation, Mickey Martinez, the tribal certificates of title are of banknote quality and resemble titles of other jurisdictions.[10] Also, according to Martinez, the tribal license plates conform to the national standards for visibility design and size.[11]

At present, three vehicles have been issued tribal registrations and titles. One of these vehicles is owned by an individual tribal member and the remaining two are owned by the Nation's government.[12] Plaintiff estimates that there will be approximately 300 to 400 vehicles registered and titled under the PBMVC if the Nation is allowed to proceed with its titling and registration system.

Because the reservation does not have some necessary facilities, such as service or repair facilities for vehicles and healthcare facilities, occasionally it is necessary for privately owned or tribally owned vehicles to leave the reservation. Additionally, it is necessary for the tribally owned vehicles to leave the reservation to perform government functions such as storm spotting and tornado detection.[13] Absent the preliminary injunction imposed by this Court, drivers of tribally licensed and registered vehicles leaving the reservation would be in violation of

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[10] Martinez Aff. ¶ 2.

[11] *Id.*

[12] *Id.* at ¶ 4.

[13] *Id.*

state law for failure to present a properly registered vehicle, resulting in ticketing or possible seizure.

State law requires all vehicles that operate within Kansas to have registrations and titles issued by the State.[14] Kansas Statutes Annotated § 8-142 makes the following acts unlawful:

> First: To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle . . . which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the [applicable state division].
>
> Second: To display or cause to permit to be displayed, or to have in possession, any registration receipt, certificate of title, registration license plate, registration decal . . . knowing the same to be fictitious or to have been canceled, revoked, suspended or altered. The named defendants have either taken the position or are enforcing the position that plaintiff's tribal registrations and titles violate the above statute when used off-reservation. Because the State does not regard registrations and titles issued by the Nation as valid, three citations have been issued by the State pursuant to Kansas Statutes Annotated § 8-142 for persons driving tribally-registered vehicles off the reservation.[15]

Pursuant to Kansas Statutes Annotated § 75-4302 the Director of Vehicles, defendant Walker, is empowered to

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[14] *See* Kan. Stat. Ann. § 8-142.

[15] *See* Kan. Stat. Ann. § 8-142.

enter into reciprocity agreements with other "states" regulating the use of vehicles owned by citizens of other states on the highways of Kansas. According to Kansas Statutes Annotated § 74-4305, the term state means, "state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of the foreign country. . . ." In accordance with this supposed wide latitude to recognize other jurisdictions' registrations, the State of Kansas allows the use of all private passenger vehicle registrations and all government passenger vehicle registrations issued by other jurisdictions to non-residents.[16] Additionally, the State authorizes a number of particular vehicle registrations to be issued for local governments, including cities, counties and school districts.[17] The State of Kansas allows vehicles registered by Indian tribes located in Oklahoma to be driven within the state.[18] And finally, defendants have represented to the Tenth Circuit in the context of this case that if the Nation were a Minnesota tribe, the State would recognize their vehicle registrations.[19]

Often police officers communicate with dispatchers to get information on a vehicle and its occupants before they

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[16] Kan. Stat. Ann. § 8-138a.

[17] Pl.Ex. 24.

[18] *See State v. Wakole,* 265 Kan. 53, 959 P.2d 882 (1998).

[19] *See* Appellants' Application for Stay, Tenth Circuit Case No. 99-3324; Sheila Walker Deposition (admitting that she would recognize plaintiff's registrations and titles if it was a Minnesota tribe). *See also* Wright and Miller, Federal Practice and Procedure § 2722 (noting the Rule 56(c) permits the court to consider any admissions on file in the pending litigation).

approach the vehicle.[20] There are several information systems available to police officers regarding a vehicle and its passengers. Police officers have access to the Kansas Criminal Justice Information System ("KCJIS") which provides vehicle registration information through the Department of Motor Vehicle's ("DMV")[21] files. Law enforcement officers use this system to verify that the DMV registration information matches the vehicle that is stopped. Officers also have access to the National Law Enforcement Telecommunications System ("NLETS"). The purpose of NLETS is to provide for the interstate and/or interagency exchange of criminal justice related information. Finally, officers may access information from the National Crime Information Center ("NCIC") which is a computerized index of criminal justice information.

Law enforcement officers go through a two-part safety screening process when they pull over a vehicle.[22] First, when an officer stops a vehicle, he or she checks to see if either the vehicle or the occupants have been entered into the NCIC database. If the vehicle or occupants have not been entered into the NCIC database, that satisfies the first screen for officer safety.[23] Second, if the DMV registration information, retrieved through the KCJIS system, matches the vehicle stopped, then the second screen for officer safety is satisfied.

Registration information for the three vehicles registered pursuant to the PBMVC is not available on the

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[20] Warders Aff. ¶ 2.

[21] The DMV files are maintained by the Department of Revenue.

[22] Warders Aff. ¶ 2.

[23] *Id.*

KCJIS system.[24] However, the Nation asserts that all tribal vehicle registrations and titles issued by the Nation, and all pertinent tribal vehicle registration information has been delivered to the State of Kansas and all local law enforcement agencies including the Jackson County Sheriff's office, the Kansas Highway Patrol, the Holton, Kansas police department and the Nation's chief of police. Additionally, registration information for vehicles registered to Indian nations located in Oklahoma is not available to Kansas law enforcement officers for use in the field.

In this case, plaintiff seeks declaratory and injunctive relief requiring the State of Kansas to extend reciprocity privileges throughout the state to plaintiff's tribally-issued vehicle registrations and certificates of title.

C. Tenth Circuit Opinion

In reviewing this Court's issuance of a preliminary injunction, the Tenth Circuit addressed two major issues: (1) whether this Court had subject matter jurisdiction over the action; and (2) whether this Court abused its discretion in issuing the preliminary injunction.[25] Under the first inquiry, the Tenth Circuit found, contrary to defendants' assertion, that the Court had federal question jurisdiction over the case.[26] In addition, the circuit court found plaintiff

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[24] Based on defendants' statement of facts, it appears that there would be no cause to register a vehicle or an individual under the NCIC system until the individual somehow becomes involved in the criminal justice system.

[25] *Prairie Band,* 253 F.3d at 1239.

[26] *Id.* at 1239-40.

presented an Article III case or controversy, plaintiff had sufficient standing to bring the action, and that the *Young* abstention doctrine was inapplicable.[27]

As to the second inquiry, the circuit court found that this Court did not abuse its discretion in issuing the injunction.[28] In reaching this conclusion, the circuit court rejected numerous arguments presented by defendants. Defendants unsuccessfully asserted that: (1) the injunction lacked proper specificity; (2) the Court applied the wrong standard in issuing the preliminary injunction; and (3) the merits of the injunction failed the traditional four-part preliminary injunction standard.[29]

In evaluating whether the district court abused its discretion, the court first found that without the injunction, the Nation would suffer irreparable harm. The court noted that the defendants' actions in enforcing the State's title and registration laws as it applies to those with tribally issued titles and registrations created the "prospect of significant interference with tribal self-government."[30] The court further noted that such an inference with tribal self-government could not be compensated via monetary damages not only because valuation of the harm would be difficult but also because the State's Eleventh Amendment

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[27] *Id.* at 1240-42.

[28] *Id.* at 1242-57.

[29] *Id.*

[30] *Id.* at 1250 (citing *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir.1989)).

sovereign immunity may prevent plaintiff from recovering damages.[31]

In evaluating the second factor for issuing a preliminary injunction – balancing the potential harms – the court determined that the district court did not abuse its discretion by finding the harm to plaintiff's right to tribal self-government outweighed defendants' concern for public safety. The court noted that based on the record it appeared the defendants had exaggerated the safety problem posed by trial registrations and titles given the fact that Kansas recognizes the registrations and titles of tribes residing outside the state. Additionally, the court rejected defendants' arguments regarding state sovereignty, finding that "[f]ederal Indian law is replete with examples in which state law has had to accommodate tribal sovereignty."[32]

Discussing the third prong of the preliminary injunction analysis – public interest – the court noted that under Tenth Circuit case law, tribal self-government may be a matter of public interest.[33] In addition, the court once again noted that the defendants' asserted public interest, public safety, was "not as portentous as the defendants would have it. . . ."[34]

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[31] *Id. See also A.O. Smith Corp. v. F.T.C.*, 530 F.2d 515, 525 (3d Cir.1976) (noting the irreparable harm is often suffered when "the injury can [not] be adequately atoned for in money. . . .")

[32] *Prairie Band*, 253 F.3d at 1252 (citing Felix S. Cohen, Handbook of Federal Indian Law 234 (1982 ed.)).

[33] *Id.* at 1253 (citing *Seneca-Cayuga*, 874 F.2d at 716).

[34] *Id.*

Finally, the court focused the bulk of its analysis on the fourth prong of the preliminary injunction test, whether there were questions going to the merits that are "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[35] In determining there were serious issues for litigation, the court noted that the doctrine of federal preemption and/or the doctrine of Indian sovereignty are possible barriers to defendants' assertions of authority regarding motor vehicle registration and titling.[36] The court questioned defendants' assertion that the above doctrines only apply to activity on reservation land, finding that the court must balance the tribal, federal, and state interests when conducting the preemption analysis.

With the road map drawn by the Tenth Circuit, the Court will proceed in deciding the motions currently before the Court.

II. STANDARDS OF REVIEW

A. Motion to Dismiss

In ruling on a motion to dismiss, the Court accepts the veracity of all well-pleaded facts in the plaintiff's complaint and views both the facts and all reasonable inferences in the

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[35] *Id.* (citing *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir.1999)). The traditional fourth prong is whether the party seeking the injunction has a substantial likelihood of success on the merits. But, when the party sufficiently demonstrates the first three factors, the less stringent standard, discussed above is controlling.

[36] *Id.* at 1254.

light most favorable to the plaintiff.[37] The pleadings must be construed liberally.[38] In a Rule 12(b)(1) motion, the Court may consider documents and other information submitted to the Court in addition to the plaintiff's complaint.[39]

B. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[40] There is a "genuine" issue of material fact if a reasonable jury could return a verdict for the nonmoving party.[41] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[42]

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. This may be met by showing that there is a lack of evidence to

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[37] *Housing Authority of Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir.1991); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir.1984).

[38] *Gas-A-Car, Inc. v. American Petrofina, Inc.*, 484 F.2d 1102, 1107 (10th Cir.1973).

[39] *Armstrong v. Goldblatt Tool Co.*, 609 F.Supp. 736, 737 (D.Kan.1985).

[40] Fed.R.Civ.P. 56(c).

[41] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[42] *Id.* at 251-52, 106 S.Ct. 2505.

support the nonmoving party's case.[43] Once the moving party properly supports its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[44] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."[45] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[46] The Court must consider the record in the light most favorable to the nonmoving party.[47]

III. MOTION TO STRIKE

Instead of adequately responding to the issues presented in plaintiff's motion for summary judgment,[48] defendants have asked the Court to strike almost every single piece of evidence plaintiff presents in support of its motion for summary judgment. The Court largely finds defendants' objections to plaintiff's evidence frivolous. In any event, the Court makes the following findings.

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[43] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[44] *See Anderson*, 477 U.S. at 256, 106 S.Ct. 2505.

[45] *Id.*

[46] *See id.*

[47] *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir.1984).

[48] By way of explanation, defendants' response to plaintiff's motion for summary judgment contains a ninety-seven page motion to strike and twenty pages of arguments and authorities which are largely non-responsive to issues raised in plaintiff's motion for summary judgment.

A. Affidavits

Affidavits submitted in support of or in opposition to a motion for summary judgment must "set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein."[49] Although the content or the substance of the evidence contained in the affidavit must be admissible, the evidence does not have to be in a "*form* that would be admissible."[50]

In general terms, defendants make conclusory allegations that the affidavits presented by plaintiffs are not made on personal knowledge, do not set forth facts that would be admissible in evidence and do not affirmatively show that the affiant is competent to testify to facts contained therein. Additionally, defendants complain that the papers referred to in the affidavits are not directly "attached thereto" the affidavit. Apparently defendants are not satisfied that the papers referred to in the affidavits are attached as exhibits in the record. As a preliminary note, the Court will not exclude the affidavits simply because the papers are not attached directly to the affidavit and are contained in the record as separate exhibits.

In addition, because the Court relies on the affidavit of Mickey Martinez, the Court finds it necessary to address some of defendant's objections to her affidavit. First, the Court notes that defendants' complaints regarding the Martinez Affidavit are merely broad assertions with little credibility. For example, in many of their objections

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[49] Fed.R.Civ.P. 56(e).

[50] *Thomas v. International Business Machines,* 48 F.3d 478, 485 (10th Cir.1995) (citations and quotations omitted).

defendants simply contend Ms. Martinez did not have personal knowledge of the matters attested to or is not competent to testify to the matters contained therein. The Court finds, thereby eliminating many of defendants' objections, that Ms. Martinez, as tribal motor vehicle registrar and as manager of all tribal vehicles, is competent to testify about matters pertaining to the facilities located on the reservation and thus the necessity of leaving the reservation, matters concerning tribal motor vehicle registration and matters concerning use of government vehicles. Further, any defect in Ms. Martinez' initial affidavit concerning her personal knowledge was cured by her supplemental affidavit which states, "[a]ll statements in this affidavit and in my first affidavit . . . are made upon my personal knowledge."

Additionally, defendants object to some portions of the Martinez affidavit on the basis that statements contained therein are conclusory and non-personalized. Defendants assert that because testimony contained in the affidavit is identical to some of the information contained in Jon Boursaw's affidavit, (Pl.Ex. 33), Martinez is not competent to testify to the facts contained in her affidavit. To the extent defendants are arguing that only one person is competent to testify to a certain set of facts, defendants arguments are rejected.[51]

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[51] Defendants object to portions of the Jon Boursaw affidavit for the same reasons they objected to Martinez's affidavit. The Court rejects defendants' objections for substantially the same reasons stated above. The Court finds, thereby eliminating many of defendants' complaints, that Mr. Boursaw, as the executive director of the Prairie Band Potawatomi Nation's tribal government is competent to testify to matters involving the governmental functions of the Nation, the activities of the Nation's members, and the facilities available to

(Continued on following page)

As to defendants' request for an order striking portions of other affidavits contained in the record, defendants' motion is denied as moot because the Court does not rely on any hearsay, legal opinions or conclusions, statements not made on personal knowledge or conclusory statements contained in the above mentioned affidavits.

B. Documentary Evidence and Statutes

Defendants make several objections to plaintiff's documentary evidence on the grounds that the exhibits are not identified, authenticated and swom [sic]. With respect to plaintiff's exhibits 7-13, and 19, and 27-30 defendants have waived their objections, other than relevancy, in the Pretrial Order ("PTO") (Doc. 143). Thus, defendants' motion to strike these exhibits is overruled as waived.[52] Additionally, to the extent defendants move to strike any statutes or other legislative material from plaintiff's arsenal of exhibits, including plaintiff's exhibits 16, 17, and 20-23, defendants' motion to strike is denied, as the Court's ability to take judicial notice of such items is unquestionable.[53]

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members on the reservation. Mr. Boursaw's affidavit avers that he is familiar with the governmental functions of the Nation and that all directors of the various tribal government departments report to him.

[52] Mickey Martinez swore to, identified and authenticated exhibits 7-13 through her supplemental affidavit (Pl.Ex. 44).

[53] *See United States v. Coffman*, 638 F.2d 192, 194 (10th Cir.1980). This ruling applies to plaintiff's exhibits 1, 2, 16, 17, 20-23, and 25. To the extent it is questionable whether the Court can take judicial notice of plaintiff's exhibit 2, Title 17 of the Tribal Code, the Court finds the affidavit of Steve Ortiz, Exhibit 43, cures any authentification [sic] and identification problems.

Second, with respect plaintiff's exhibits 4, 5, and 6, copies of a tribal certificate of title form, a sample tribal license plate, and the Reciprocity Agreement with the State of Minnesota, respectively, the affidavit of Mickey Martinez attests to their authenticity and identification. Ms. Martinez is the Motor Vehicle Registrar for the Nation and as her supplemental affidavit (Pl.Ex. 44) makes clear, she has personal knowledge of and is competent to testify as to the authenticity of exhibits 4, 5, and 6. Further, the affidavit of Steve Ortiz (Pl.Ex. 43), the tribal Secretary of the Prairie Band Potawatomi Nation, identifies and attests to the authenticity of plaintiff's exhibit 6. Additionally, Ortiz, as the custodian of all official documents of the Nation, including exhibit 6, is clearly competent to testify.

For the reasons discussed above and because the Court does not rely on evidence that does not comply with Federal Rule of Civil Procedure 56(e) or D.Kan Rule 56.1(d), defendants' motion to strike is denied.

IV. DISCUSSION

A. Jurisdiction and The Eleventh Amendment

The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe.[54]

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[54] *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

In *Ex parte Young*,[55] the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers sued in their official capacity, to enjoin an alleged ongoing violation of federal law.[56] Defendants have alleged both in their motion to dismiss and in their motion for summary judgment that *Ex parte Young* may not be used to overcome the State's Eleventh Amendment sovereign immunity. Specifically, defendants allege that plaintiff has failed to allege an ongoing violation of federal law and that the named defendants are not connected to the enforcement of the Kansas motor fuel act. As explained below, the Court disagrees with defendants' contentions and accordingly, their motion to dismiss and motion for summary judgment shall be denied as to this issue.

In their motion to dismiss, defendants contend that the *Ex parte Young* doctrine is inapplicable because plaintiff has failed to allege an ongoing violation of federal law. To that end, defendants allege that the allegations contained in plaintiff's complaint are "wholly insubstantial and frivolous." Remarkably, in affirming this Court's issuance of a preliminary injunction, the Tenth Circuit found exactly the opposite of what defendants argue here today. On appeal from this Court's issuance of a preliminary injunction, defendants argued that the Court lacked subject matter jurisdiction because plaintiffs failed to raise a "colorable federal claim." Like defendants do here, they essentially argued before the Tenth Circuit that a claim is

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[55] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[56] *Ex parte Young*, 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine*, 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young*).

colorable only when it must succeed on the merits. In rejecting defendants' arguments, the court found that plaintiff made a colorable claim in alleging that under the Indian Commerce Clause and the Kansas Act for Admission the state is required to extend recognition to the motor vehicle registrations and titles issued by the Nation. The court noted that plaintiff's claims were not "wholly insubstantial and frivolous in light of the various Supreme Court cases in which the validity of state motor vehicle laws as applied to tribes and their members was challenged on similar grounds."[57]

Once again, defendants' motion to dismiss is replete with arguments going to the merits of plaintiff's claims. Defendants' arguments are simply irrelevant in determining whether plaintiff has *alleged* an ongoing violation of federal law. This is especially true in light of the fact that the Tenth Circuit has already decided that plaintiff has asserted a colorable federal claim in this case. For these reasons, the Court declines to assess the merits of plaintiff's claims in deciding defendants' motion to dismiss. Instead, the Court finds plaintiff has sufficiently alleged an ongoing violation of federal law to satisfy the requirements of *Ex parte Young*.

In addition, defendants' motion for summary judgment asserts that plaintiff may not bring an *Ex parte Young* action because the named defendants do not have a

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[57] *Prairie Band*, 253 F.3d at 1240 (citing *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 127, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-64, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976)).

"special connection" to the unconstitutional act or conduct complained of. Defendants correctly note that those state officials being sued in an *Ex parte Young* action must have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.[58] Plaintiff has established the defendants' demonstrated willingness to enforce the state laws at issue. The Court notes that all of the named defendants have stipulated that they have taken the position that tribally issued titles and registrations are not legally recognized in the State of Kansas.[59]

Defendants argue, however, that none of the defendants has the required connection to the enforcement of the state laws at issue. Contrary to defendants' argument, the defendants do not need to have "special connection" to the enforcement of the disputed state laws for an *Ex parte Young* action to proceed. The Supreme Court, in *Ex parte Young* stated that "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact. . . ."[60]

Plaintiff has established that the named defendants have some connection with enforcement of the state laws at issue, satisfying the *Ex parte Young* requirement. Defendant Walker, as the Director of Vehicles, administers the Department of Revenue's division of vehicles pursuant to Kansas Statutes Annotated § 75-5110, supervises vehicle reciprocity matters under Kansas Statutes Annotated

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[58] *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441 (stating that the state officer against whom an injunction is sought "must have some connection with the enforcement of the act").

[59] *See* Pretrial Order at 3. (Doc. 143).

[60] *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441.

§ 75-5116, and manages vehicle registrations and titles. Defendant Wagnon, as the Secretary of Revenue, supervises the entire Department of Revenue, including defendant Walker, and is responsible for enforcing the position that the Nation's titles and registrations are invalid in the State of Kansas. And, defendant Seck, as the Superintendent of the Kansas Highway Patrol, is responsible for enforcing "traffic and other laws of the state relating to highways, vehicles, and drivers of vehicles."[61] This includes enforcement of Kansas Statutes Annotated § 8-142, the statute under which those with tribally issued titles and registrations have been ticketed.[62]

Defendants seem to assert that because Walker, Wagnon or Seck cannot change state law to remedy plaintiff's concerns, but can only enforce the laws as written, they are not proper parties. This reasoning is faulty, as the essence of an *Ex parte Young* action is seeking relief against the state officials who are responsible for enforcing

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[61] Kansas Statutes Annotated § 74-2105.

[62] Defendants' contention that plaintiff's claims are barred because it omitted any factual contentions relating to whether the named defendants have authority to enforce either of the laws challenged in the pretrial order is equally without merit. Omitting a claim or a defense from the pretrial order is fundamentally different from omitting a factual contention defendant perceives to be necessary to plaintiff's case. The pretrial order clearly contains plaintiff's claim that the defendants are violating federal law by failing to recognize tribally issued registrations and titles. *See* Pretrial Order at 8. (Doc. 143). *See also Hullman v. Bd. of Trustees*, 950 F.2d 665, 667 (10th Cir.1991) (noting that the trial court has discretion to exclude from trial those *issues* and *claims* not found in the pretrial order).

the violative state laws, not against state officials who drafted the violative legislation.[63]

Finally, to the extent defendants attempt to argue that plaintiff has not made the necessary showings to satisfy the Article III case or controversy requirements, the issue has already been decided by the Tenth Circuit.[64] In *Prairie Band,* the court decided live issues existed in this case making it ripe and not moot.[65] The issues pending – namely whether the state must recognize motor vehicle registrations and titles issued by the Nation[66] – are still present in this litigation and have not become moot.

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[63] The Court summarily rejects defendants' contention that this case is in substance, a suit against the State. The relief sought simply requires the named defendants to recognize tribally issued registrations and titles, or at least refrain from ticketing tribal officials and members driving tribally registered vehicles off the reservation. This is not an instance where the relief requested would be as much of an intrusion on state sovereignty as an award of money damages, creating a violation of sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (declaratory relief against the state establishing the tribe's right to quiet enjoyment to submerged lands located within the boundaries of the reservation was a functional equivalent to a quiet title action and in violation of the Eleventh Amendment); *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1193 (10th Cir.1998). Defendants' citations to cases involving tort liability are wholly unpersuasive.

[64] U.S. Const. art. III, § 2 (requiring that judicial power be reserved for actual "cases" and "controversies"). *See also Amisub (PSL), Inc. v. State of Colorado Dep't of Soc. Servs.,* 879 F.2d 789, 794 (10th Cir.1989) (noting that if a party "does not have a legally cognizable interest in the outcome of the case, no live controversy exists – any issuing federal opinion would be purely advisory, and, as such, prohibited by Article III").

[65] *Prairie Band,* 253 F.3d at 1241.

[66] *Id.* at 1244 (identifying the issue in the case to be "whether the state must grant recognition to motor vehicle registrations and titles issued by the tribe").

Further, the Tenth Circuit decided that plaintiff had standing to bring this case before the Court because "[t]he state's refusal to extend recognition . . . causes an obvious harm to the tribe: interference with or infringement on tribal self-government."[67] Defendants continue to refuse to recognize tribal registrations and titles and therefore, defendants' motion for summary judgment as it applies to jurisdictional issues is denied.

B. Tenth Amendment

Citing the Supreme Court decisions *New York v. United States*[68] and *Printz v. United States*,[69] defendants argue that granting the relief requested by plaintiff would be a violation of the Tenth Amendment.[70] *New York* and *Printz* stand for the proposition that Congress cannot force states to enact or enforce federal regulatory programs.[71] But *Printz* and *New York* are easily distinguishable from the facts at hand, for here the government is not attempting to compel the state to enact or enforce a federal program.[72] Rather, plaintiff is

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[67] *Id.* at 1242.

[68] 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[69] 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

[70] U.S. Const. amend. X.

[71] *New York*, 505 U.S. at 177, 112 S.Ct. 2408 (holding that provision of the Low-Level Radioactive Waste Policy Act requiring states to accept ownership of waste or regulate according to instructions of Congress is inconsistent with the Tenth Amendment); *Printz*, 521 U.S. at 902, 117 S.Ct. 2365 (striking down portions of the Brady Act which require state officials to conduct background checks on handgun purchasers as violative of the Tenth Amendment).

[72] *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928, n. 44 (8th Cir.1997) (distinguishing *Printz* on the grounds that the case did not involve a federal law commanding state regulation).

merely asking the Court to enjoin the defendants from enforcing a *state* law that allegedly infringes on rights guaranteed to plaintiff by federal law. The Court is not persuaded by defendants' attempt to characterize the requested relief as an effort to "mandate state participation in the enforcement of a federal statutory scheme." Therefore defendants' motion for summary judgment shall be denied as to this issue.[73]

C. Permanent Injunction

The issue presented in this case, as articulated by the Tenth Circuit, is whether the doctrines of federal preemption and Indian sovereignty act as barriers to the State's exercise of its regulatory power to title and register vehicles belonging to either the Nation or its members who reside on the reservation. Plaintiff seeks relief in the form of a permanent injunction enjoining defendants from enforcing the Kansas motor vehicle registration and titling laws in a manner that prohibits or impairs the use of titles and registrations issued by the Nation.

The burden plaintiff must carry for issuance of a permanent injunction is essentially the same as the burden for a preliminary injunction, except that the plaintiff must actually succeed on the merits.[74] So, in addition to proving success on the merits, plaintiff must

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[73] *See Mille Lacs Band*, 124 F.3d at 928 (noting that "there is no question that federal courts have the power to order state officials to comply with federal law").

[74] *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *University of Texas v. Camenisch*, 451 U.S. 390, 392-94, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

demonstrate an imminent threat of an irreparable injury, that the threatened injury outweighs the harm the injunction would cause the opposing party, and that the public interest is not harmed by the injunction.[75] Of course, an injunction is appropriate only where future conduct is at issue.

[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.[76]

As noted above, the Tenth Circuit has provided direction for this Court's evaluation of plaintiff's claims. The Court will briefly address the first three factors of the permanent injunction test and dedicate much of its discussion to determining whether under the balancing of interests test, plaintiff is entitled to judgment.

1. Irreparable Harm

The Court must first decide whether plaintiff will be subject to irreparable harm if a permanent injunction is not issued. As noted by the Tenth Circuit in *Prairie Band*, "irreparable harm is often offered when 'the injury can[not] be adequately atoned for in money,' or when 'the district court cannot remedy [the injury] following a final

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[75] *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1346-47 (10th Cir.1997); *Kansas Health Care Ass'n, Inc. v. Kansas Dept. of Soc. and Rehabilitation Servs.*, 31 F.3d 1536, 1542 (10th Cir.1994).

[76] *Metzler v. IBP, Inc.*, 127 F.3d 959, 963 (10th Cir.1997) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)).

determination of the merits.'"[77] The Court finds that without an injunction, plaintiff will suffer irreparable harm.

First, the Court notes that motor vehicle registration and titling is a traditional government function.[78] The threat of continued citation by the State poses a significant threat to the plaintiff's right to self-government.[79] In addition to the threat of interference with self-government, plaintiff will also suffer irreparable harm because its injury cannot be compensated with monetary damages. This is true not only because harm to the right to self-government is too abstract to assess in terms of monetary damages, but also because the State's Eleventh Amendment immunity would preclude plaintiff from recovering money damages from the State.[80] For these reasons, the Court finds plaintiff will suffer irreparable harm if an injunction is not issued.

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[77] *Prairie Band,* 253 F.3d at 1250 (quoting *A.O. Smith Corp. v. FTC,* 530 F.2d 515, 525 (3d Cir.1976); *American Hosp. Ass'n v. Harris,* 625 F.2d 1328, 1331 (1980)).

[78] *Id.* at 1242 (citing *Crow Tribe of Indians v. Montana,* 650 F.2d 1104, 1110 (9th Cir.1981)). Defendants relentlessly argue that automobile licensing and registration is not traditional government function beyond the reservation boundaries and therefore plaintiff is not faced with any harm to its right to self-government. Defendants' arguments miss the mark. The real issue is whether defendants' actions interfere with plaintiff's sovereignty or ability to self-govern to the extent that the State's actions must be preempted by federal law, when some of defendants' actions may occur off the reservation.

[79] *Id.* at 1250 (citing *Seneca-Cayuga,* 874 F.2d at 716).

[80] *Id.* at 1251 (citing *Kansas Health Care Ass'n Inc.,* 31 F.3d at 1543 (noting that a plaintiff's injury is irreparable when the Eleventh Amendment bars a legal remedy in damages)).

2. Balancing of Potential Harms

Defendants argue that the harm imposed on the State if an injunction is issued outweighs the harm plaintiff will suffer if an injunction is not issued. In particular, defendants argue that State sovereignty will be harmed and public safety will be put in a precarious position if an injunction is issued. The Court is guided by the Tenth Circuit's findings in *Prairie Band* in resolving these issues.

In *Prairie Band* the court noted that the harm posed to the Nation is greater than that posed to the State because without the injunction, the Nation's motor vehicle registration and titling efforts would be defeated.[81] As a result, plaintiff would be deprived of its right of self governance. If plaintiff is granted relief, on the other hand, the State's titling and registration program will be minimally affected. The State will be unable to give citations and/or arrest tribal members with tribally issued registrations and titles traveling outside of the reservation. Such restraint seems insignificant considering the State already recognizes tribally issued tags from other jurisdictions.

The Court is also not persuaded by defendants' assertion that the harm to public safety with the injunction, sufficiently outweighs any harm to plaintiff without the injunction. As discussed in detail below, defendants' public safety concerns are exaggerated and simply not sufficient to outweigh the importance of plaintiff's right to self-govern. Therefore, the Court finds that the threatened injury to plaintiff outweighs the harm the injunction would cause the defendants.

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[81] *Prairie Band*, 253 F.3d at 1252.

3. Public Interest

The Court also finds that the public interest will not be harmed if a permanent injunction is granted. In *Prairie Band,* the Tenth Circuit noted that the case of law in this circuit "suggests that tribal self-government may be a matter of public interest."[82] In *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma,*[83] the Tenth Circuit held that the district court properly enjoined a pending state court action in which the State of Oklahoma sought to enjoin operation of bingo games on the plaintiff's reservation. The Court noted that "the injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government."[84] Similarly, in this case, the Court finds that granting the injunction, and thereby allowing the Nation to proceed with its own vehicle registration and titling system, will assist the Nation in achieving a strong self-government. The injunction will also allow the Nation to better control traffic on its reservation and presumably create a safer environment for Indians and non-Indians alike. For this reason, the Court concludes that issuance of the injunction will not harm public interest.[85]

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[82] *Id.* at 1253 (citing *Seneca-Cayuga,* 874 F.2d at 716.).

[83] 874 F.2d 709 (10th Cir.1989).

[84] *Id.* at 716.

[85] To the extent defendants argue that the public's interest in its safety will be harmed if the injunction is granted, defendants' arguments are rejected. As noted below, defendants' purported public safety concerns are not as serious as defendants purport them to be.

4. Success on the Merits

To succeed on the merits of its claim, plaintiff must demonstrate that the state laws at issue are preempted by federal law or that the doctrine of Indian sovereignty in conjunction with federal preemption bars the State from enforcing its title and registration laws, as they apply to plaintiff.[86] Because of the unique status afforded to Indian affairs, "it [is] generally unhelpful to apply . . . standards of preemption that have emerged in other areas of the law."[87] Instead, the body of federal case law dealing with the relationship between tribes, states and the federal government has developed a specific set of guidelines that only apply to preemption issues involving tribes. Perhaps the most important of these guidelines is the notion that "in order to find a particular state law to have been preempted by operation of federal law, [there need not be] an express congressional statement to that effect"[88] or a treaty containing an express preemptive statement.[89] "Preemption in the context of federal Indian law is also unique in that it rests 'principally on a consideration of the competing

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[86] *Prairie Band,* 253 F.3d at 1254 (noting that there are "at least three possible barriers to the state's assertions of authority with respect to motor vehicle registration," 1) congressional enactments demonstrating "congressional concern with fostering tribal self-government may preempt the state registration and titling laws, 2) treaties between the Nation and the United States may preempt the state laws, and 3) the doctrine of Indian sovereignty "might act as a bar to state regulatory authority").

[87] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[88] *Id.* at 144, 100 S.Ct. 2578.

[89] *See Prairie Band,* 253 F.3d at 1253 (citing *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 174-75, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

interests at stake' – i.e., tribal, federal, and state interests."[90]

The doctrine of Indian sovereignty – "the right of reservation Indians to make their own laws and be ruled by them" – may also work "in tandem" with federal preemption as a barrier to the exercise of state power.[91] This doctrine provides an essential "backdrop against which the applicable federal treaties and statutes must be read."[92] Therefore, the Court will consider the doctrine of Indian sovereignty in connection with the preemption analysis and not as a separate barrier to the state's regulatory authority.

It is with these principles in mind that the Court sets out to balance the respective state, federal and tribal interests.[93]

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[90] *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)).

[91] *Id.* at 1254.

[92] *McClanahan*, 411 U.S. at 172, 93 S.Ct. 1257.

[93] In *Prairie Band*, the Tenth Circuit specifically rejected the Ninth Circuit's position that the balancing of interests test is inapplicable when the activity sought to be regulated by the state takes place off reservation land. *See Prairie Band*, 253 at 1255 n. 9. *Compare Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir.2001). Consequently, the defendants' assertion that balancing is unnecessary because some of the activity at issue in this case takes place off the reservation, is rejected.

a. Tribal Interests and Federal Interest

The federal government has a firm policy in favor of "promoting tribal self-sufficiency and economic development."[94] Other than this general overarching policy, there is no other federal law that absolutely requires the Court to give broad preemptive effect to the tribal ordinance in question. As noted above, despite the apparent absence of an obvious preemptive federal law, the Court's inquiry does not end. Indeed, the area of Indian preemption is unusual in that no express federal statement is necessary to preempt a state law.[95]

Although there is no federal law having an obvious preemptive effect on defendants' efforts to enforce its titling and registration laws against plaintiff, several congressional enactments are indicative of the federal policy promoting tribal self-sufficiency, self-government and economic development, including the following: Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479; Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543; and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-458e.[96] Although these enactments do not speak directly to tribal vehicle titling and registration ordinances, such ordinances are a by-product of the federal policy toward self-determination, self-sufficiency

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[94] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[95] *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1109 (9th Cir.1981).

[96] *See White Mountain*, 448 U.S. at 143, 100 S.Ct. 2578 (noting that the tradition of Indian sovereignty is "reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.")

and self-government.[97] Thus, while there is no federal legislation addressing tribal vehicle registrations and titling, there is an obvious federal interest in the Nation's right to self-government.

As a "backdrop" to the Court's balancing endeavor, it must consider the doctrine of Indian sovereignty. To that end, it is noted that there can be no question that the Nation has a right to "make their own laws and be ruled by them."[98] This doctrine "specifically prohibits state action that impairs the ability of a tribe to exercise traditional government functions" such as vehicle registration.[99] Motor vehicle registration and titling is a traditional governmental function and the state's interference with the Nation's pursuit in this regard is considered interference with or infringement on tribal self-government.[100] Because the issue at hand involves a traditional government function, the tribal and federal interests are heightened. Not only does the Nation have an interest in making its own laws and being ruled by them, the federal government has an interest in seeing that the Nation strives

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[97] *Queets Band of Indians v. Washington*, 765 F.2d 1399, 1407 n. 6 (9th Cir.1985) (citing *White Mountain*, 448 U.S. at 143, 100 S.Ct. 2578).

[98] *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)). *See also White Mountain Apache v. Arizona*, 649 F.2d 1274 (9th Cir.1981).

[99] *Crow Tribe of Indians v. Montana*, 650 F.2d at 1110 (citing *Red Lake Band of Chippewa Indians v. Minnesota*, 311 Minn. 241, 248 N.W.2d 722 (1976)).

[100] *Prairie Band*, 253 F.3d at 1250. *See also Queets Band of Indians*, 765 F.2d at 1403 (concluding that "Indian tribes possess the sovereign authority to license and register tribal vehicles.")

toward self-sufficiency.[101] The Court finds that the Nation's efforts to implement tribal registration and titling laws work toward maximizing these federal and tribal interests.[102]

Defendants argue that the Nation has absolutely no interest in the right to self-governance once a tribal official or member drives off the reservation. The Court disagrees. The Supreme Court has noted that in some cases the extent of tribal sovereignty clearly goes beyond simple geographical limits to include the tradition of Indian

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[101] *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (noting that both Indian tribes and the federal government "are firmly committed to the goal of promoting tribal self-government. . . .") (citing Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*) ("It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*; Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*; Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*).

[102] The Court summarily rejects defendants' assertion that the federal government's interests actually lie in state regulation of vehicle registration and titling matters, not in tribal self-government. The Court acknowledges there are several federal regulations that address state regulation of highways. *See e.g.*, 23 U.S.C. § 402. These statutes, however, do not preclude tribal vehicle registration and titling enactments. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (noting that if Congress intends to abrogate Indian rights, it must do so expressly). Instead, these statutes mostly limit state control of highways by making federal funding contingent upon the State's enactment of certain safety requirements.

sovereignty over the reservation and its members.[103] This principle holds especially true when there are issues going to tribal self-governance.[104] In this case, the Nation did not enact a tribal code merely to regulate registrations and titles for vehicles belonging to the Nation and its members. Instead, the Nation enacted a comprehensive code meant to apply to all vehicles and occupants of vehicles coming and going from the reservation. The stated purposes of the PBMVC included: 1) tribal control and regulation of motor vehicle traffic on the reservation, 2) orderly registration and licensing of vehicles owned by tribal members and located on roads and highways within the reservation, 3) assisting law enforcement officers in identifying owners of the vehicles, 4) prevention of fraudulent transfers, theft and conversion, 5) providing revenue to the Nation through taxation and fees, and 6) allowing for the orderly transfer of title and other transactions involving vehicles. The fact that tribal members and officials are occasionally compelled to leave the reservation is an "ancillary consequence" to the ultimate fact that the Nation is attempting to achieve the above stated goals.[105]

Issues similar to those presented in this case have been decided by at least two other courts. In *Queets Band of Indians v. Washington*,[106] the Ninth Circuit determined that two tribes in the State of Washington, the Quinault Indian Nation (Queets) and the Muckleshoot Band of Indians (Muckleshoots), had the inherent authority to

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[103] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[104] *White Mountain*, 448 U.S. at 144-45, 100 S.Ct. 2578.

[105] *Prairie Band*, 253 F.3d at 1255.

[106] 765 F.2d 1399 (1985).

register and license tribal vehicles. Consequently, the court found tribal ordinances requiring tribally issued titles and registrations were sufficiently preemptive to require the state to recognize tribal licensing and registration power pursuant to the State's reciprocity provisions. After examining the relevant state, federal and tribal interests, the court stated:

> [T]he tribes' exercise of sovereignty in licensing and registering their respective tribal vehicles carries with it sufficient "preemptive" force to require that the state of Washington afford reciprocal recognition. "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." We believe that we have reached the best accommodation between those interests.[107]

Although the court's decision was later withdrawn at the request of the parties in anticipation of legislation that would render the controversy moot, the Court finds the Ninth Circuit's reasoning persuasive.

The Supreme Court of Minnesota has also addressed the issues presented by this case. In *Red Lake Band of Chippewa Indians v. State*,[108] the tribal council for the Red Lake Band of Chippewa Indians enacted a motor vehicle licensing and registration ordinance. The State of Minnesota refused to recognize the validity of tribally issued

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[107] *Queets*, 765 F.2d at 1408 (quoting *Colville*, 447 U.S. at 156, 100 S.Ct. 2069).

[108] 248 N.W.2d 722 (Minn.1976).

registrations under its reciprocity statute and informed the tribal council that members who drove on roads outside the reservation in vehicles without Minnesota registrations and plates would be subject to arrest. Upon judicial review of the state's position, the Minnesota Supreme Court first determined that adoption of the motor vehicle registration ordinance was an appropriate exercise of the tribe's powers of self-government.[109] The court then determined that issuance of tribal registrations would be of little value if the state refused to recognize their validity beyond the territorial limitations of the reservation.[110] The state's refusal to recognize the tribal registrations would in effect, nullify the tribal ordinance. The court ultimately found that such a result unjustifiably interfered with the internal government of the Red Lake Band.

Similarly, in the case before the Court, the State's refusal to recognize registrations and titles issued by the Nation is an affront to the Nation's lawful and rightful attempt to self-govern. If an injunction is not issued, the Nation's motor vehicle code will be effectively defunct. Having determined that the federal and tribal interests favor the Nation's right to enact and enforce its own vehicle registration and titling laws, the Court now turns to assessing the State's interests in enforcing its vehicle registrations and titling laws.

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[109] *Red Lake Band*, 248 N.W.2d at 727 (noting that the state "should not, in the absence of some compelling state interest, impose burdens upon persons subject to the governing authority of the Red Lake Band when such burdens will undermine the effectiveness of the Band's efforts to achieve effective self-government").

[110] *Id.*

b. State Interests

Defendants argue that the State's interests in regulating the registration and titling of all vehicles driven on state highways overcomes any interest the Nation may have in tribal registration and titling. Defendants primarily argue that because persons driving tribally registered and titled vehicles will inevitably need to leave the reservation, the State's sovereignty interests and public safety interests tip the balance in favor of the State. There can be no doubt that state authority over Indians is more extensive when the activity in question occurs off the reservation.[111] Even so, state authority can be preempted if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[112]

In *Mescalero Apache Tribe v. Jones*,[113] the Supreme Court determined that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law, otherwise applicable to all citizens of the State."[114] Clinging to this language, defendants contend that beyond the reservation, plaintiff simply has no interest in tribal registration and titling. Even assuming that the State's policies regarding tribal registrations and

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[111] *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

[112] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

[113] 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

[114] *Mescalero*, 411 U.S. at 148-49, 93 S.Ct. 1267.

titling are "nondiscriminatory," *Mescalero* may be distinguished.[115]

In *Prairie Band,* the court cautioned that *Mescalero* is not necessarily dispositive as to the issues before the Court. First, the court stated that it reads *Mescalero* "to say that, if the tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state," but not always.[116] The court noted that this case presents a more difficult issue because the tribal activity in question involves a traditional governmental function, namely the registration and titling of motor vehicles. In *Mescalero,* on the other hand, the issue before the court was whether the State of New Mexico could collect a nondiscriminatory gross receipts tax from a ski resort owned and operated by the tribe but located off the reservation. The fact that a traditional government function is at issue in this case heightens the Nation's interests and presents a "significant counter to the state's interests,"[117] thereby distinguishing *Mescalero.*

Mescalero can also be distinguished because the ski resort, the operation the state sought to tax, was operated exclusively off the reservation. In this case, the disputed tribal activity, tribal registration and titling of vehicles, takes place primarily on the reservation.[118] Two courts

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[115] Because the Court ultimately finds that the State regulations at issue are preempted, the Court does not reach the issue of whether defendants' policies regarding tribal registrations and titling are nondiscriminatory.

[116] *Prairie Band,* 253 F.3d at 1255 n. 9.

[117] *Id.* at 1256.

[118] *Id.* (citing *People v. McCovey,* 36 Cal.3d 517, 205 Cal.Rptr. 643, 685 P.2d 687 (1984)).

have determined that when some of the activity the state seeks to regulate takes place off the reservation, but the primary tribal conduct in question occurs on the reservation, the state's interest in regulating the conduct is less compelling. In *People v. McCovey*,[119] the California Supreme Court "was faced with that state's attempt to regulate off-reservation fish sales by individuals who were not members of the tribe. The fish in question, however, were caught on the reservation by tribal members."[120] The court distinguished *Mescalero* by noting that the activity in *Mescalero* occurred entirely off the reservation. After balancing the state, tribal and federal interests, the court concluded that the state was preempted from regulating the off-reservation sale of fish caught on the reservation by tribal members.

Similarly, the Ninth Circuit decided in *In re Blue Lake Forest Products, Inc.*,[121] that state law was preempted where the "essential conduct" – severance of timber and its removal without proper compensation – occurred on the reservation. The court noted that the "Indian enterprise at the heart of [the] dispute – the timbering lands – is located on, not off, the reservation," and then determined that federal and tribal interest preempted the application of state law and thus barred state regulation.[122]

Both *Blue Lake* and *McCovey* are instructive regarding the issues presented in this case because the primary activity in question here – tribal registration and titling of

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[119] 685 P.2d at 687.

[120] *Id.* at 697.

[121] 30 F.3d 1138, 1141 (9th Cir.1994).

[122] *Id.*

vehicles – occurs within the boundaries of the reservation. Indeed, the only instance when tribal registrations become problematic is when a tribal member or official is required to leave the reservation. Accordingly, the Court finds that the tribal and federal interests are heightened because the conduct at the heart of this dispute takes place on the reservation.

Defendants also argue that the State's interest in public safety outweighs any legitimate right plaintiff has in tribal titling and registration. Defendants' primary concern is that registration information for tribal members is not accessible from any computer databases by law enforcement creating a potentially dangerous situation for officers. But, as noted in *Prairie Band,* defendants' safety concerns are largely exaggerated.[123] The evidence in the record shows that law enforcement officers use three systems to access information about vehicles, their drivers

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[123] *Prairie Band,* 253 F.3d at 1251-52. In determining that defendants may have exaggerated safety problems posed by tribal registrations and titles, the court noted the following:

> (1) Master Trooper Gary Thiessen of the Kansas Highway Patrol stated outright in an incident report that "this issue was not one of safety, but one of revenue," Aplts' App. vol. III, at 118 (Kansas Highway Patrol Combined Incident Report, dated Aug. 12, 1999); (2) vehicles with tribal registrations and titles were in use for several months without any safety-related incident; (3) Jackson County Attorney Michael A. Ireland did not seem troubled by the safety issue, voluntarily adopting a policy under which no citations would be issued to the tribe or its members until a meeting could be held, see *id.*, at 110 (affidavit of Mr. Ireland); (4) the safety issue did not appear to worry the state of Minnesota, which granted recognition to the tribe's registrations and titles; and (5) in spite of its concern about safety, Kansas still recognizes the registrations and titles of tribes residing outside the state.

and their passengers. Officers use the KCJIS to determine whether the registration information provided by the Department of Motor Vehicles ("DMV") matches the vehicle that has been stopped.[124] Officers also use the NLETS and NCIC systems to retrieve criminal justice information. It appears that if a vehicle, its driver or its passenger have been involved in a criminal matter they are entered into the NCIC system so that an officer may retrieve information in the event of a future confrontation.

According to the Court's review of the record, the fact that an individual has a tribally registered and titled vehicle does not prevent registration with the NCIC. The only common denominator for vehicles and persons entered in the NCIC database is contact with the criminal justice system. Also, plaintiff has averred that it has provided all pertinent tribal vehicle registration information to the Department of Revenue. Defendants have asserted that the Department of Revenue maintains DMV records which contain registration information vital to KCJIS.[125] If defendants choose to enter the information plaintiff has provided them into the DMV database, tribal registration and titling information will apparently become available in KCJIS. This hardly seems difficult as the Department of Revenue, and in turn the DMV, have all

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[124] The Department of Revenue maintains the DMV registration information.

[125] It appears that the State of Kansas provides all registration information to NLETS.

the information required to enter a small number of tribally registered vehicles into its system.[126]

Defendants' safety and sovereignty concerns are also slightly diminished because Kansas officials have once before been forced to recognize tribal license plates. In *State v. Wakole*,[127] the Kansas Supreme Court ruled that under Kansas Statutes Annotated § 8-138a, the State is required to recognize license plates issued by the Sac and Fox of Oklahoma. Although the court's rationale for forcing Kansas officials to recognize the tribal plates in that case is much different than the rationale of this Court, it stands to reason that Kansas officials can and have dealt with issues arising from recognition of tribal plates. Indeed, the registration information defendants claim is essential to public safety is not available for vehicles bearing Sac and Fox of Oklahoma tribal tags.

Defendants' sovereignty arguments are also diluted because contrary to defendants' assertions, plaintiff does not seek to nullify state registration laws. Instead, it seeks an injunction requiring the State to recognize their licensing and titling authority through the application of the State's reciprocity statute. In balancing the threat to the State's sovereignty interests with the threat to the Nation's sovereignty interests, the Court finds that the balance tips in favor of the Nation. The Court's decision rests primarily on the fact that if the State does not recognize tribal registrations and titles, there will be no

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[126] *See Prairie Band*, 253 F.3d at 1252 (noting that "Federal Indian law is replete with examples in which state law has had to accommodate tribal sovereignty. . . .")

[127] 265 Kan. 53, 959 P.2d 882 (1998).

tribal registrations and titles and the Nation will be unable to effectively pursue the goal of self-government. The State, on the other hand, will simply have to expand its recognition of tribal registrations to those issued by the Prairie Band of Potawatomi Indians.

Defendants also assert that consumer protection will be at stake if plaintiff is allowed to proceed with registering and titling vehicles. In particular, defendants complain that PBMVC contains no provisions for inspections of certain non-highway and salvage vehicles, otherwise known as "special circumstance" vehicles. Defendants further assert that only certain individuals in the Kansas Highway Patrol have the expertise to conduct inspections of special circumstance vehicles.

But, the PBMVC does not provide for the registration or titling of these special circumstance vehicles.[128] Plaintiff concedes that the PBMVC also does not provide for the inspection of these special circumstances vehicles; and asserts that the Nation would be compelled to request an inspection by the highway patrol, of any special circumstance vehicle allegedly involved in a crime. Thus, any consumer protection concerns about special circumstances vehicles are not implicated, for the inspection of special circumstances vehicles is not affected by the PBMVC.[129]

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[128] *See* PBMVC § 17-10-3(D) which states, "Salvage or non-highway registrations or titles shall not be issued by the Nation or used by the Registrar as a basis for issuing regular tribal registrations or titles."

[129] *See* PBMVC § 17-10-3(C) (calling for inspection procedures in accordance with "generally accepted inspection practices commonly utilized by other jurisdictions in the United States" and in accordance with the policies of the American Association of Motor Vehicle Administrators and the National Highway Traffic Safety Administration).

In addition to the issues addressed above, in *Prairie Band,* the Tenth Circuit advised the parties to consider whether the Supreme Court cases *Washington v. Confederated Tribes of Colville,*[130] and *Oklahoma Tax Commissioner v. Sac and Fox Nation,*[131] have any application to the facts before the Court. Remarkably, neither party adequately briefed the applicability of these cases. Despite that fact, the Court feels compelled to determine whether the dictates set forth in *Colville* and *Oklahoma Tax Commission* are useful in the resolution of this case.

In *Colville,* the Supreme Court struck down state motor vehicle taxes, referred to as "excise taxes," imposed on vehicles owned by tribes or their members, used both on and off the reservation.[132] In *Oklahoma Tax Commission*, the Supreme Court struck down the State of Oklahoma's motor vehicle excise tax and registration fees as they applied to tribal members residing in "Indian country."[133] In both cases, however, the Court left open the possibility of a different result had the state tailored its tax to the amount of actual off-reservation use. The Court finds that the application of *Colville* and *Oklahoma Tax Commission* to the facts of this case is limited. The facts in the current case present no opportunity to specifically tailor vehicle registration and titling to off-reservation use. Tribal registration and titling is an all-or-nothing proposition. The

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[130] 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

[131] 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993).

[132] *Colville,* 447 U.S. at 163-64, 100 S.Ct. 2069. *See also Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 480-81, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (holding that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who reside on the reservation).

[133] *Oklahoma Tax Comm'n,* 508 U.S. at 127-28, 113 S.Ct. 1985.

PBMVC requires an individual applying for a tribally issued title to surrender all other certificates of title issued by any other sovereign.[134] Without a tribally issued title, an individual may not register his or her vehicle under the PBMVC.[135]

The *Colville* Court also reviewed a tribal cigarette tax imposed on non-Indian purchases on the reservation. The Colvilles contended that their right to tax transactions occurring on their reservation eliminated the state's power to collect its tax.[136] The Court rejected this argument because it found that the state had not infringed on the right of tribal self-government.[137] The Court noted that while tribes have an interest in raising revenues for essential governmental programs, "that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes. . . ."[138] The Court determined that the tribe was essentially marketing an exemption from state taxes to non-Indians.[139] The Court's holding in this regard has essentially no application to the facts at hand. There has been no allegation that the Nation is marketing an exemption to non-Indians. Instead, this case deals only with the Nation's ability to provide a vehicle registration and titling mechanism to its own government and to its members.

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[134] PBMVC § 17-10-19(A)(8).

[135] PBMVC § 17-10-4(D).

[136] *Colville*, 447 U.S. at 154, 100 S.Ct. 2069.

[137] *Id.* at 156-57, 100 S.Ct. 2069.

[138] *Id.* at 156-57, 100 S.Ct. 2069.

[139] *Id.* at 157, 100 S.Ct. 2069. *See also Moe*, 425 U.S. at 483, 96 S.Ct. 1634 (upholding state cigarette tax on Indian smokeshop operators because legal incidence of tax fell on non-Indian purchasers).

c. Preemptive Effect

The Court finds that contrary to defendants' assertions, the on-or-off reservation distinction is not the only factor the Court must look to in determining whether defendants' registration and titling laws are preempted as they apply to properly registered and titled tribal vehicles. Although plaintiff's activity off the reservation generally would tip the scales in favor of the State, the Court finds that in this matter, where a traditional government function is involved, where defendants have already been forced to recognize other tribally registered and titled vehicles, and where the off-reservation is ancillary to an important on-reservation activity, the tribal and federal interests outweigh the State's interests.

The Court finds that defendants' enforcement of Kansas Statutes Annotated § 8-142 as it applies to vehicles bearing registrations and titles issued by the plaintiff undermines the federal policy encouraging tribal self-government. Additionally, the Court finds that the state's articulated interests do not outweigh the Tribe's interest in maximizing the goal of self-government in the form of a comprehensive vehicle titling and registration system. This is especially true in light of the fact that Kansas is already recognizing out-of-state tribally issued registrations pursuant to its reciprocity statute. Thus, the Court finds that defendants' enforcement of State titling and registrations laws as they apply to tribal members and officials who have properly issued tribal titles and registrations is preempted by federal law.[140]

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[140] Due to the Court's preemption analysis, the Court does not reach the question of whether defendants' refusal to extend reciprocity

(Continued on following page)

V. CONCLUSION

The Court finds that no genuine issues of material facts exist in this case and that plaintiff is entitled to judgment as a matter of law. In so ruling, the Court finds that this is a proper *Ex parte Young* action and therefore the State is not entitled to Eleventh Amendment immunity. The Court also finds that granting the relief requested by plaintiff does not mandate state participation in the enforcement of a federal statutory scheme and therefore the Tenth Amendment has not been offended. Finally, the Court finds, after balancing state, federal and tribal interests, defendants are preempted from enforcing state title and registration laws against plaintiff and any person who operates or owns a vehicle properly registered and titled under PBMVC § 17-10-1 *et seq.*

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 154) is granted. Defendants are permanently enjoined and restrained from further application and enforcement of the Kansas motor vehicle registration or titling laws against the plaintiff and any persons who operate or own a vehicle properly registered and titled under PBMVC § 17-10-1 *et seq.* This order applies to vehicles driven both on and off of plaintiff's reservation. This injunction is not meant to have any effect on Kansas traffic laws that do not deal directly with vehicle registration, vehicle license plates, and motor vehicle titles.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (Doc. 144) is denied, Defendants' Motion

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to plaintiff's registrations and titles violates the Kansas Act for Admission.

to Strike (Doc. 161) is denied and Defendants' Motion for Summary Judgment (Doc. 146) is denied, and Plaintiff's Motion to File Response to Motion to Strike Out of Time (Doc. 170) is granted.

Supreme Court, U.S.
FILED
AUG 26 2005
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(2)

No. 04-1740

IN THE

Supreme Court of the United States

JOAN WAGNON, in her official capacity as Secretary, Kansas Department of Revenue, *et al.*,
Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit properly ruled that federal law bars Kansas from refusing to permit the use of motor vehicle registrations and titles duly issued by an Indian Tribe located within the State, when Kansas permits the use of registrations and titles duly issued by other States, foreign countries, and even out-of-state Indian Tribes, and when the Kansas policy would effectively foreclose the Tribe's vehicle registration program.

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BRIEF IN OPPOSITION

The State of Kansas generally permits the use of motor vehicle registrations and titles issued by other States, territories and possessions of the United States, foreign countries, states and provinces of other countries, and even out-of-state Indian Tribes, but refuses to permit the use of motor vehicle registrations and titles issued by Respondent Prairie Band Potawatomi Nation (the "Nation"), an Indian Tribe located in Kansas. In the decision of the United States Court of Appeals for the Tenth Circuit below, all three panel members agreed that the State's selective refusal to recognize registrations issued by the Nation cannot stand. *See* Pet. App. 19a; *id.* at 31a (McConnell, J., concurring).

The State's sole contention here is that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), rather than *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), controls this case. According to the State, the Tenth Circuit majority's application of *Bracker* to what the State describes as a "nondiscriminatory State law imposed off-reservation," Pet. 4, "creates a palpable conflict between authority from this Court and the Ninth Circuit" that merits this Court's review, *id.* at 11.

Even assuming *arguendo* that *Bracker* and *Jones* represent competing analytical frameworks, this case does not present the issue pressed by the State. All three panel members below concluded, contrary to the central premise of the State's petition, that the Kansas law is not "nondiscriminatory." *See* Pet. App. 11a (describing the "discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe"); *id.* at 30a (explaining that Kansas' application of the statute is "a form of discrimination"). The State's refusal to permit the use of tribally issued registrations thus fails regardless of whether

the reasoning in *Bracker* or *Jones* is applied. Indeed, Judge McConnell's concurring opinion – which the State's petition inexplicably fails even to mention – applied *Jones* in the precise way the State urges here and concluded that the State's actions cannot be sustained.

Neither is there a "schism," Pet. 4, among the Circuits. Both the panel majority and Judge McConnell recognized that the conclusion that the State's actions are discriminatory and cannot survive is wholly consistent with the Ninth Circuit's decision in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) ("*Cabazon IV*"). *See* Pet. App. 11a ("[T]he *Cabazon IV* analysis regarding the discriminatory effect of the State's motor vehicle code is sound."); *id.* at 31a ("This analysis comports with the Ninth Circuit's approach in [*Cabazon IV*].").

Because the discriminatory Kansas policy is unlawful regardless of whether *Bracker* or *Jones* is the focus of analysis, and because there is no conflict on that issue with the Ninth Circuit (or any other Circuit), this case presents nothing more than an academic debate about the line (if any) between *Bracker* and *Jones*. Accordingly, the State's petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

The Nation is a federally recognized Indian Tribe that was evicted from its ancestral home in the Great Lakes region and eventually resettled in present-day Kansas. *See Tiller's Guide to Indian Country* 554 (Veronica E. Velarde Tiller ed., 2005 ed.). Today the Nation resides on a 121-square-mile reservation in a remote and rural area of Jackson County, Kansas. The reservation's roads have become more

heavily traveled since the Nation constructed a modern casino complex, which it owns and operates pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

Exercising its inherent sovereign authority, the Nation in 1999 enacted the Prairie Band Motor Vehicle Code, Potawatomi Law and Order Code title 17 ("PBMVC"). The PBMVC is a comprehensive motor code, the basic purpose of which is to "implement reasonable rules, regulations, and penalties essential to maintaining a safe and efficient transportation system" on the reservation. PBMVC § 17-1; *see* Pet. App. 2a. As explained in the code itself, the PBMVC's detailed regulations were necessary because of the "increasing number of tribal members . . . seeking to reside on the Reservation," the "increasing number of motor vehicles . . . being used by Indian and non-Indian persons to enter the Reservation territory in order to engage in gaming and other activities with Tribal enterprises or members," and the "significant increase in the amount of motor vehicle traffic on the Reservation." PBMVC § 17-1; *see id.* § 17-10-1; Pet. App. 35a.

Among other things, the PBMVC requires tribal vehicle registrations and titles for all vehicles owned by tribal members who reside on the reservation and for all tribal government vehicles. Pet. App. 35a. To obtain a tribal registration under the PBMVC, an individual must surrender any title certificate issued by another jurisdiction. *Id.* at 35a-36a. The tribal title certificates resemble titles of other jurisdictions, and the tribal license plates conform to national standards for visibility, design, and size. *Id.* at 36a. In addition, before a tribal registration is issued, the Nation inspects vehicles in accord with generally accepted practices. The Nation delivers pertinent information for all tribal registrations and titles to the State of Kansas and local law

enforcement agencies, although the State has refused to include that information in the State's computer database. *Id.* at 39a-40a. It is anticipated that 300-400 tribal registrations will be in use if the tribal system is permitted to proceed. *Id.* at 36a. The PBMVC exempts from its registration requirement any vehicle duly registered in another jurisdiction, so long as that jurisdiction provides reciprocal recognition to the Nation.

Kansas also has a registration and titling requirement. Under the Kansas motor vehicle code, all vehicles that operate in Kansas must be registered and titled by the State. *See* Kan. Stat. Ann. § 8-142. However, nonresidents who operate vehicles in Kansas are exempt from these requirements if they are "duly licensed in the state of residence," so long as the nonresident "state" provides reciprocal recognition to Kansas drivers. *Id.* § 8-138a. For purposes of the registration requirement, the term "state" includes any "'state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of the foreign country.'" Pet. App. 38a (quoting K.S.A. § 74-4305). Under these provisions, Kansas recognizes registrations issued by other States, Canada, Mexico, and even out-of-state Tribes. *See Kansas v. Wakole*, 959 P.2d 882 (Kan. 1998); Pet. App. 18a; *id.* at 38a & n.19. Kansas also exempts certain in-state local vehicle registrations of cities, counties, and school districts. Kansas has nevertheless refused to recognize registrations issued by the Nation.

Tribal members must frequently leave the reservation in their vehicles – for example, to obtain auto repairs, to seek certain medical services, or simply to shop for products that are not available on the reservation. Pet. App. 36a. In addition, tribal government-owned vehicles at times must

leave the reservation to perform government functions such as storm spotting and meeting with state officials. *Id.* Because the State refuses to recognize tribal registrations and titles, however, these tribally registered vehicles are subject to seizure, citation, and penalty when they drive on off-reservation Kansas roads without a Kansas registration. So far, Kansas has issued three citations involving tribally registered vehicles.

It is undisputed that the Nation's government and members cannot practicably comply with both tribal and Kansas registration and titling requirements, and that Kansas' policy effectively forecloses the tribal registration scheme. *See, e.g.*, Pet. App. 16a (noting that the State's failure to recognize tribal registrations would render the tribal system "'effectively defunct'") (quoting Pet. App. 68a); *id.* at 74a-75a ("[I]f the State does not recognize tribal registrations and titles, there will be no tribal registrations and titles and the Nation will be unable to effectively pursue the goal of self-government."); *id.* at 59a (absent an injunction, the Nation's registration and titling program "would be defeated").

B. The District Court Proceedings

The Nation brought suit in the United States District Court for the District of Kansas to enjoin Kansas from enforcing its registration and title requirements against vehicles duly registered under the PBMVC. The Nation argued that the State's policy impermissibly infringed the Nation's right to self-government, was preempted by federal law, and illegally discriminated against the Nation. The district court granted the Nation's request for a preliminary injunction, *see Prairie Band of Potawatomi Indians v.*

Pierce, 64 F. Supp. 2d 1113 (D. Kan. 1999), and the Tenth Circuit affirmed, 253 F.3d 1234 (10th Cir. 2001).

The district court then granted summary judgment for the Nation.[1] Applying this Court's analysis in *Bracker*, the district court concluded that the Kansas law could not be enforced against vehicles registered under the PBMVC. *See* Pet. App. 61a-78a. With respect to federal and tribal interests, the district court determined that "[m]otor vehicle registration and titling is a traditional government function," and that "the state's interference with the Nation's pursuit in this regard is considered interference with or infringement on tribal-self government." *Id.* at 64a. The district court explained that even off-reservation state action may impermissibly infringe tribal sovereignty, particularly when the State's action effectively forecloses the exercise of important aspects of "tribal self-government," *id.* at 66a, the "heart" of which occur on-reservation, *id.* at 72a, such as the enactment of a comprehensive tribal motor vehicle code. In contrast, the district court concluded that the State's articulated interests in sovereignty and public safety were minimally threatened, because the Nation provides the State with pertinent information for its vehicle database used by law enforcement officers, *id.* at 72a-74a, and because "Kansas is already recognizing out-of-state tribally issued registrations pursuant to its reciprocity statute," *id.* at 78a.

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[1] The district court also denied the State's motion for summary judgment and its motion to dismiss, rejecting its arguments that the Nation's suit was barred by the Tenth and Eleventh Amendments to the United States Constitution. These arguments were subsequently rejected by the Tenth Circuit as well.

C. The Tenth Circuit's Decision

The Tenth Circuit affirmed. The panel majority first rejected the State's argument that the *Bracker* balancing test should not be applied. Pet. App. 9a. The Tenth Circuit concluded that *Bracker* and *Jones* are not inconsistent in that, under *Jones*, "'if the tribal activity is off reservation that fact *generally* tips the balancing in favor of the state.'" *Id.* at 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9). The Tenth Circuit also concluded that the balancing test is not inapplicable simply because some off-reservation conduct is at issue. Further, unlike the ski resort at issue in *Jones*, the tribal activity that is burdened – the "licensing and titling of vehicles" – "takes place on the reservation" and involves a traditional government function. *Id.* at 14a.

Applying the *Bracker* balancing test, the panel majority determined that "vehicle registration involves a traditional government function," and that the Nation "has a significant interest in regulating motor vehicles on its reservation through the comprehensive PBMVC and through the issuance of tribal registrations and titles." Pet. App. 16a.[2] As the majority explained, if Kansas continues to enforce its registration and title requirements against tribal members, the similar requirements of the PBMVC "'will be effectively defunct.'" *Id.* (quoting Pet. App. 68a). The majority found these tribal interests "linked with strong federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance." *Id.* at 17a. In contrast,

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[2] The State has not contended in this case that the Nation lacks the power to enact a tribal registration and titling program, or that the State's criminal laws prohibit such a program on the Nation's reservation. It is thus undisputed that the Nation's enactment of its motor vehicle code is a valid exercise of its sovereign powers.

there was no evidence that the articulated state interests – public safety and sovereignty – were jeopardized by exempting drivers with tribal registrations. Indeed, "Kansas recognizes license plates from other states, Canada, and Mexico, and tribally issued tags from other jurisdictions, including Minnesota and Oklahoma, without any record-supported safety concerns." *Id.* at 18a. Thus, "[b]alanced against the amorphous and unsupported safety concerns asserted by the State, the Tribe's interest in self-governance by enacting and enforcing its own vehicle registration and titling laws must prevail." *Id.* at 19a.

The panel majority also placed substantial reliance on the discriminatory nature of the Kansas policy, concluding that "[c]ertainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.

Judge McConnell concurred. Pet. App. 25a-31a. In his view, a discrimination analysis under *Jones* rather than the balancing test of *Bracker* was applicable. He concluded, however, that the State could not survive the discrimination analysis because the State's registration and titling policy was *not* "non-discriminatory." *Id.* at 29a. Judge McConnell emphasized that under the Kansas registration policy, "residents of Missouri, Newfoundland, or Singapore can drive on Kansas roads without being forced to register," as can members of "Indian tribes from outside of Kansas." *Id.* at 29a. Indeed, "out of the universe of non-Kansas vehicles that appear on Kansas highways," the only non-exempt group is "Kansas-based Indian tribes." *Id.* at 29a-30a. Judge McConnell rejected the State's purported public safety justification for this discrimination because Kansas had not taken any steps – by amending its titling statute or otherwise

– to address safety concerns with respect to any other jurisdiction. Judge McConnell also noted in this regard that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*]," which had invalidated California's refusal to permit tribal law enforcement vehicles to display emergency lights when law enforcement vehicles from other jurisdictions were permitted to do so. *Id.* at 31a. Judge McConnell thus concluded that the Kansas policy was "a discriminatory application of state law that violates the [*Jones*] standard." *Id.*[3]

REASONS FOR DENYING THE PETITION

1. Petitioners' principal contention is that the decision below creates a split of authority as to whether "off-reservation" enforcement of "nondiscriminatory" state motor vehicle codes is properly evaluated under the *Bracker* framework – which requires courts to balance federal, state, and tribal interests to determine whether state regulations affecting Indians are preempted by federal law or unduly infringe upon tribal sovereignty.[4] According to the State, the

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[3] As Judge McConnell noted, the State expressly disclaimed any interest in generating revenue as a basis for imposing registration requirements on the Nation, choosing to rely exclusively on public safety and sovereignty as justifications for its discrimination. *See* Pet. App. 30a n.2.

[4] On October 3, 2005, the Court will hear oral argument in *Wagnon v. Prairie Band Potawatomi Nation*, No. 04-631, which involves a challenge to Kansas' motor fuel tax, as applied to fuel sold and delivered to an on-reservation tribal gas station. Although that case involves the applicability and application of *Bracker*, its resolution is unlikely to affect this case, because, among other things, the Kansas vehicle registration policy at issue here is discriminatory and thus invalid regardless of whether

Bracker framework is limited to situations involving purely on-reservation conduct, and because the Kansas law at issue here involves off-reservation roads, the applicable law is described in *Jones*, in which the Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to *nondiscriminatory* state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added).

As discussed below, even if presented, the *Bracker* issue raised by the State is neither the subject of a meaningful split of authority nor otherwise worthy of this Court's review. *See infra* pp. 13-23. But the State's plea for review fails for a more basic reason. As the Tenth Circuit held, the Kansas law at issue is *discriminatory*, and it thus may not be enforced regardless of which analysis the Court applies. The issue pressed by the State – whether "nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in [*Bracker*]," Pet. 4 – is simply not presented.

All three judges below concluded that the Kansas policy is discriminatory. Kansas law requires all vehicles driving on Kansas roads to be registered and tilted by the State of Kansas. *See* Kan. Stat. Ann. § 8-142. However, any individual whose vehicle is duly registered and titled by another "state" is exempt from the Kansas requirements, so long as the other "state" extends reciprocal privileges to Kansas drivers. *See id.* § 8-138a. This exemption applies not only to individuals properly registered in other States of the United States, but also to those registered by foreign countries and out-of-state Indian Tribes. *See* Pet. App. 18a.

Bracker applies. Accordingly, there is no basis to hold this case pending resolution of 04-631.

Thus, as Judge McConnell reasoned in his concurrence, the State's interpretation singles out in-state Tribes such as the Nation for impermissibly discriminatory treatment. *See, e.g.*, Pet. App. 31a ("This is a discriminatory application of state law . . . ."). As Judge McConnell explained, the State's purported safety and sovereignty rationales – the only rationales invoked by the State, *see supra* n.3 – fail to justify the State's discriminatory policy, because "Kansas recognizes [other] foreign vehicles without reference to any safety standards," and thus imposes "on residents of Kansas-based reservations a requirement that it does not impose on residents of any other jurisdiction." Pet. App. 30a-31a.

The panel majority similarly recognized the discriminatory nature of State's registration and title policy, concluding that "the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a. Although it did not expressly adopt the discrimination analysis used by Judge McConnell, the majority did "not disagree with the concurrence's discrimination analysis," which "may very well be an additional appropriate analysis in the instant case." *Id.* at 20a.[5]

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[5] As Judge McConnell observed, the State "strenuously argued in [the Tenth Circuit] that the [*Jones*] discrimination test, rather than the *Bracker* balancing test, applies to this case," although it "failed to offer a persuasive argument why [the State] should *prevail* under the [*Jones*] test" – as the Nation argued below. Pet. App. 27a n.1. Thus, although the Tenth Circuit applied the *Bracker* balancing analysis, the discrimination issue was also properly presented and considered.

The State nevertheless pretends as if that analysis never happened. Indeed, the State's petition repeatedly describes its policy as "nondiscriminatory," Pet. 4, 5, 6, 10, 12, 13, 16, and even raises the specter of the Tenth Circuit's ruling being used to strike down "an otherwise lawful, nondiscriminatory State law imposed off-reservation," *id.* at 4, apparently oblivious to the Tenth Circuit's discrimination-based reasoning and Judge McConnell's concurrence. But as all members of the Tenth Circuit panel recognized, the State's insistence that the Kansas policy is "nondiscriminatory" does not make it so. Regardless of whether *Jones* or *Bracker* controls (assuming such a dichotomy), the State's discriminatory registration policy is unenforceable against tribal registrations. The State's petition is thus not an appropriate vehicle for delineating the line, if any, between these two cases.

Nor is the question whether the Kansas policy is discriminatory independently worthy of review. That question turns on a fact-specific analysis of the Kansas policy, making it an inappropriate candidate for certiorari. Moreover, there is no conflict among the lower courts on this issue. Indeed, the only other court facing an analogous situation concluded that the state policy there at issue was discriminatory. In *Cabazon IV*, the Ninth Circuit considered the validity of a provision of California's vehicle code that prohibited the Cabazon tribal police vehicles from displaying emergency light bars, while permitting the display of such bars by California local law enforcement vehicles, as well as law enforcement vehicles of the federal government, bordering States, and even private security companies. *See* 388 F.3d at 698-99. The Ninth Circuit concluded that the State's enforcement of its light bar provisions against the Cabazon's law enforcement vehicles was discriminatory

under *Jones* and was therefore preempted by federal law. *See id.* at 701 (noting that California "discriminates against the Tribe").

Both the panel majority and Judge McConnell's concurrence cited the Ninth Circuit's discrimination analysis with approval. Indeed, the panel praised as "sound" the Ninth Circuit's "analysis regarding the discriminatory effect of the State's motor vehicle code" in *Cabazon IV*. Pet. App. 11a. And Judge McConnell noted that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*.]." *Id.* at 31a. The discrimination at the core of this case thus undermines the State's plea for review.

2. The State's petition should also be denied because this case does not, as the State claims, present the question whether *Bracker* "applies" to off-reservation state regulations. This is so, because, as the panel majority ruled, this is not an "off-reservation" case. Rather, this case – although complicated by "the transitory nature of motor vehicles," Pet. App. 9a – ultimately concerns a state policy that nullifies the tribal "licensing and titling of vehicles," which "takes place on the reservation," *id.* at 14a. Thus, "[e]ven though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons," the majority "'deem[ed] it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'" *Id.* (quoting *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 (9th Cir. 1994) (classifying a case as "on-reservation," even though it "implicates an off-reservation relationship between the two non-Indian actors," where "the Indian enterprise at the heart of this dispute – the timbering lands – is located on, not off, the reservation")).

Thus, the panel majority did not purport to apply *Bracker* to exclusively off-reservation activity – notwithstanding the State's repeated claims to the contrary. *See* Pet. 4-11. Indeed, the majority even stated that it did "not necessarily disagree with [the State's] statement that the '[*Bracker*] balancing of interests test [is inapplicable] when the activity sought to be regulated by the State takes place off reservation land.'" Pet. App. 13a-14a (quoting the State's appellate brief; second and third brackets in original). The core of the State's challenge is thus that the majority erred in its fact-bound conclusion that this case is properly viewed as an "on-reservation" case. Such error correction is not a proper basis for this Court's review.

Moreover, the majority got it right. The record evidence is undisputed that if the State enforces its registration requirements against tribal vehicles, the Nation's "'motor vehicle code will be effectively defunct.'" Pet. App. 16a (quoting district court); *see, e.g.*, *id.* at 59a, 74a-75a (district court findings). In light of the devastating on-reservation consequences of the State's refusal to permit the use of tribal registrations off-reservation – the effective nullification of the Nation's sovereign power to enact a motor vehicle code and regulate its government and members – there is no reason to question the panel majority's sound determination that this is at base an "on-reservation" case.

3. Review by the Court is unwarranted even were this case to involve a nondiscriminatory state policy applied to "off-reservation" conduct because the application of *Bracker* to such a policy is not – as the State contends – "directly contrary to the repeated statements and holdings of this Court." Pet. 5. Indeed, far from endorsing the State's approach, the Court has repeatedly *rejected* arguments that the *Bracker* analysis does not apply when the specific

conduct regulated by a State occurs off the reservation. For example, in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court contemplated the application of the *Bracker* balance-of-interests analysis where the legal incidence of a state tax is placed on the off-reservation "wholesalers who sell to the Tribe." *Id.* at 459. That approach is consistent with the Court's rejection a decade earlier of a "'legal incidence'" test in place of applying *Bracker* in the tax context, "under which legal incidence and not the actual burden of the tax would control the pre-emption inquiry." *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 n.8 (1982); *see, e.g., Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74 (1994) (applying balancing analysis to obligations imposed on off-reservation wholesalers).

Indeed, at least a century of precedent endorses the common-sense notion that off-reservation state regulation can impermissibly infringe on-reservation tribal sovereign interests. In *Winters v. United States*, 207 U.S. 564 (1908), for example, the United States successfully sued to prevent the building of off-reservation dams and reservoirs that would have limited water flows to the reservation. *Id.* at 576; *see Arizona v. California*, 373 U.S. 546, 598-601 (1963). The same principle is reflected in the fishing cases. In *United States v. Winans*, 198 U.S. 371, 379 (1905), for example, the Court enjoined the use of a "fishing wheel" on private property off the reservation when that wheel unduly restricted the ability of the Tribe to fish at its "usual and accustomed places." And in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that neither the Tribe nor the State could "rely on the State's regulatory powers or on

property law concepts to defeat the other's right to a 'fairly apportioned' share" of the fish. *Id.* at 682; *see id.* at 679-85 (discussing cases).[6]

The State would use the reservation border to immunize off-reservation state regulations from preemption, no matter how devastating the effect on tribal-self government. For example, as here, the State could effectively nullify a tribal motor vehicle code – enacted pursuant to the Nation's sovereign right to control its members and territory – by refusing to recognize tribal registrations off-reservation, thus forcing tribal members to eschew tribal registration if they intend any off-reservation travel. This Court, however, has repeatedly rejected such an approach, which would allow Tribes to exercise sovereign authority "only at the sufferance of the State." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). Rather, in situations where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," this Court "resolve[s] th[e] conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973).

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[6] The State places great weight on *Nevada v. Hicks*, 533 U.S. 353 (2001), for its claim that states have *carte blanche* to regulate the off-reservation activities of Indians. Pet. 7-9. However, as the Tenth Circuit explained, *see* Pet. App. 11a-15a, the principles announced in *Hicks* concern the limits of *tribal* power to reach out and regulate the conduct of nonmembers, whereas the question here concerns the scope of *federal* power to limit state interference with a Tribe's exercise of its sovereign powers. *Hicks* is thus fully consistent with (and did not purport to affect) the *Bracker* framework in a situation like this. Unsurprisingly, the State does not even try to allege a split on this issue.

That the threat to the Nation's sovereign powers is a central feature of this case also shows why *Jones* does not establish a categorical rule against preemption for any off-reservation activity, as the State claims. *Jones* involved state taxation of Indians who ventured off the reservation to build a ski resort. In that case, there could be no claim that the tribal sovereign power to regulate on the reservation was effectively nullified by the off-reservation state tax. As the Tenth Circuit recognized, the Court in *Jones* simply had no occasion to consider a context – such as the one presented here – in which an ostensibly off-reservation state regulation effectively nullifies a core aspect of on-reservation tribal self-government.[7]

The State's approach is similarly at odds with the protections afforded Tribes by the Indian Commerce Clause. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (acknowledging the Clause's "role to play in preventing undue discrimination against, or burdens on, Indian commerce"). The contours of the constitutional protection are determined by the extent of the burden on Indian commerce and the importance of the tribal, state, and federal interests at stake – not by "where" the State imposes the

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[7] The Court in *Jones* stated that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have *generally* been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added). The Tenth Circuit harmonized this passage from *Jones* with *Bracker* and its progeny to mean that "'if the tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state.'" Pet. App. 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9).

burden.[8] The State's approach, in which federal and tribal interests become *entirely irrelevant* so long as the State enforces its offending regulation "off-reservation," cannot be reconciled with the careful balancing of interests that the Clause requires.

Finally, the State exaggerates the consequences of a refusal to restrict the balancing inquiry to purely on-reservation conduct, suggesting that "any off-reservation state regulatory activity is vulnerable." Pet. 11. But that is hardly the case, for it is only where, as here, ostensibly "off-reservation" state regulations devastate the federal and tribal interests in tribal self-government but forward no discernible state interest that the balance will weigh in favor of preemption. The State exaggerates further still in claiming that recognizing tribal registrations will "expose[] the States' system of highway safety and management and regulation of the thousands upon thousands of vehicles on the State's highways to unwarranted vulnerability as a practical matter." *Id.* But Kansas itself recognizes tribal registrations from other states, such as Minnesota and Oklahoma, without any reported negative effects. *See* Pet. App. 18a. Likewise, there are no reports of chaos from the many jurisdictions that choose to recognize in-state tribal registrations without the need for lengthy court battles. *See, e.g.*, S.D. Codified Laws

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[8] Similarly, in the context of the Interstate Commerce Clause, the focus of the inquiry is the effect of the burden on interstate commerce regardless where such burden arises. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981) ("State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of the Commerce Clause inquiry.").

§ 32-5-42; Wash. Rev. Code Ann. §§ 46.16.020, 46.16.022; Wis. Stat. Ann. § 341.409.

4. Not only is the Tenth Circuit's approach fully consistent with this Court's precedent, but there is no split of authority among lower courts warranting review.

To support its claim of a "schism," Pet. 4, the State cites only *one* other court of appeals decision – a Ninth Circuit opinion that the State concedes has been *withdrawn*. *See* Pet. 9 (citing *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001) ("*Cabazon II*"), *vacated*, 271 F.3d 910 (9th Cir. 2001)). *Cabazon II* was an earlier iteration of the challenge to the discriminatory California law that prohibited the display of "light bars" by in-state tribal law enforcement vehicles. Over a dissent, the *Cabazon II* panel, in a wide-ranging opinion, found *Bracker* inapplicable and would have sustained California's policy under *Jones*. *See* 249 F.3d 1110. The Ninth Circuit's *Cabazon II* opinion – "sound" or not, Pet. 9 n.3 – was later withdrawn, and superseded by *Cabazon IV*, which concluded that the California policy was discriminatory and could not be sustained under *Jones*. *See Cabazon IV*, 388 F.3d at 701.

The State's narrow focus on *Cabazon II* and studied failure to discuss *Cabazon IV* or the discrimination analysis in the Tenth Circuit's opinion is telling. For *Cabazon IV* creates no "palpable conflict," Pet. 11, with the Tenth Circuit's decision here. Indeed, the Ninth Circuit's reasoning and result in *Cabazon IV* largely track the Tenth Circuit's decision at issue here. To begin with, both decisions reach the same conclusion – that States may not enforce discriminatory provisions of their motor vehicle codes against in-state Tribes where tribal sovereignty is jeopardized. Furthermore, although the two courts purport to

apply different analytical frameworks (*Jones* and *Bracker*), in reality each court relies on *both* cases to reach its decision. For example, although the Ninth Circuit grounded its *Cabazon IV* decision in the "discrimination" language in *Jones*, it also weighed federal and tribal interests in determining that the California policy was invalid. As the Ninth Circuit explained, the state policy both "discriminates against the Tribe *and* unduly burdens its ability to effectively perform its on-reservation law enforcement functions, thus frustrating the federal policy supporting tribal self-government." 388 F.3d at 701 (emphasis added). A pure "discrimination" framework would not be concerned with such reasoning. Similarly, the Tenth Circuit's interest-balancing in this case relied on the discriminatory nature of the exemptions from the Kansas registration requirement: "Certainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.[9]

In sum, what is more noteworthy than the reconcilable differences in doctrinal approach between the Ninth and Tenth Circuits is that *both* courts agree that state motor vehicle codes cannot be enforced against Tribes in a discriminatory manner or as to jeopardize the core exercise of tribal sovereignty. Indeed, both courts weigh similar

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[9] Notably, the State's petition does not challenge the Tenth Circuit's *application* of the *Bracker* framework – and for good reason. Under *Bracker*, and for reasons similar to those articulated by the Ninth Circuit in *Cabazon IV*, the State may not refuse to permit the use of vehicle registrations issued by the Nation. Because the decision below and *Cabazon IV* reach essentially the same result, there is certainly no conflict in the lower courts about the invalidity of discriminatory laws such as the one at issue here.

factors – namely, the relevant state, federal, and tribal interests – in reaching that conclusion. There is simply no "palpable conflict," Pet. 11, warranting this Court's review.

5. The State's fallback ground for certiorari is a request that this Court overrule the preemption analysis articulated in *Bracker* for *all* situations – both on- and off-reservation – for the sake of clarity. *See* Pet. 12-18. There is, of course, no conflict among lower courts on this question. There is no justification for granting the State's radical request.

For 30 years, this Court has consistently applied *Bracker*'s synthesis of 200 years of Indian law, including in three recent unanimous opinions. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999); *Chickasaw*, 515 U.S. at 458 (unanimous on this issue); *Milhelm Attea*, 512 U.S. at 73. In these circumstances, this Court demands a "compelling justification" before "depart[ing] from the doctrine of *stare decisis*." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

There is simply no reason to reconsider this controlling law. The status of Tribes remains "anomalous" and "complex." *Bracker*, 448 U.S. at 142. Challenges to state regulations that affect both Tribes and non-members on the reservation still present the "difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah*, 458 U.S. at 836-37 (internal quotation marks omitted). And Indian law still operates against the backdrop of "'tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero*, 462 U.S. at 334. It is for these reasons that the Court has long eschewed "standards of pre-emption that have developed in other areas of the law" –

namely, an express preemption standard – instead endorsing *Bracker*'s "flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

The State's main argument for discarding *Bracker*'s preemption framework is its claim that the balancing test "is simply unworkable." Pet. 12. But this Court has had little trouble with its application. *See, e.g., Milhelm Attea*, 512 U.S. 61 (unanimous opinion); *see also Ramah*, 458 U.S. at 846 (noting that this Court's "precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance"). And the State completely fails to substantiate its bald assertion that the *Bracker* framework "has created uncertainty and confusion in the lower courts." Pet. 18. Indeed, despite its rhetoric, the State cites only one Ninth Circuit tax case that it deems confusing. Pet. 13-16.

Moreover, this Court has long recognized that, given the unique history and complicated interests at stake, ease of application is not the dominant consideration in Indian law. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (noting that "sovereign immunity bars the State from pursuing the most efficient remedy"). The State's cries for "clear guidance, clear lines of demarcation and clear, readily applicable results," and its exaltation of categorical rules thus ring hollow, Pet. 18, for "[o]nly rarely does the talismanic invocation" of "rigid conceptions of state and tribal sovereignty shed light on difficult problems." *Colville*, 447 U.S. at 168 (Brennan, J., concurring); *see also Ramah*, 458 U.S. at 846 (rejecting categorical rule in favor of nuanced balancing of interests).

Eliminating balancing as the State urges would have devastating consequences, spurring state regulation that would threaten tribal enterprises and even entire tribal regulatory schemes, such as those approved by the Court in *Bracker* and its progeny. It also would overturn significant precedent from this Court, including the Court's several cases applying *Bracker*. There is simply no need – or reason – to eviscerate the policy of promoting and protecting the interest in tribal self-government that Congress has long embraced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

JOAN WAGNON, in her official capacity as Secretary, Kansas Department of Revenue, *et al.*,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent advances two primary reasons why certiorari should not be granted in this matter: 1) the Kansas statute at issue was found by the court of appeals to be discriminatory, and thus the issue of whether enforcement of a non-discriminatory State law off-reservation is subject to balancing under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) is "simply not presented." (Opp'n 10); and, 2) *White Mountain Apache* balancing applies with preemptive force against Kansas law because the essential activity at issue (Respondent's issuance of tribal license plates) occurs on-reservation. (Opp'n 13). None of Respondent's contentions have merit.

First, the district court determined that the issue in this case is whether the "doctrines of federal preemption and Indian sovereignty act as barriers to the State's exercise of its regulatory power. (Pet. App. 56, 70 n.115). The court of appeals, while speculating that the Kansas law might be discriminatory, ultimately rested its decision on preemption grounds because the case was not tried on grounds of discrimination, nor argued or briefed on such grounds. (Pet. App. 8, 20).

Moreover, the court of appeals itself was split as to the basis for its decision. Two members determined that *White Mountain Apache* balancing was applicable because the essential conduct at issue was Respondent's issuance of vehicle titles and tags on-reservation (Pet. App. 14), while the concurrence correctly determined that Kansas has *not* attempted to assert its jurisdiction over any on-reservation activities (a conclusion not disputed by the majority). (Pet. App. 26-27).[1]

ARGUMENT

1. As to the question of discrimination, the statute at issue is commonly referred to as a reciprocity statute.[2]

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[1] The concurrence would still rule against Kansas because of its belief that Kansas' statute is discriminatory. (Pet. App. 30-31). A result the majority rejected. (Pet. App. 8, 20).

[2] Kan. Stat. Ann. § 8-138a (Supp. 2001): "The provisions of this section shall apply only to the *nonresident* owner or owners of any motor vehicle

(Continued on following page)

Absent from discussion in any of the decisions below is a forthright acknowledgement that the plain language of the reciprocity statute applies only to nonresidents. There is no dispute that Respondent's members are residents of Kansas. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, n.10 (1987); *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976). *See also*, 41 Am. Jur. 2d *Indians* § 22 at 507 (citing *Iowa Mut. Ins. Co. v. LaPlante*). By virtue of their status as residents of Kansas, tribal members simply cannot invoke the reciprocity statute. The inability of any Kansas resident to invoke the reciprocity statute does not, however, cause the statute to be discriminatory.

If the argument of discrimination is that the absence of reciprocity for resident tribal members unduly burdens "Indian commerce," this Court has refused to credit that sort of claim. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995).

The failure to extend reciprocity to tribal members does not violate the commerce clause. As the district court noted (and the court of appeals did not dispute) there is no federal legislation in play. (Pet. App. 63). In the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland,* 235 U.S. 610, 622 (1915). The state may require registration and licensing of such vehicles and charge reasonable fees. *Id.* Moreover, the state is not automatically barred from applying such laws even if they may significantly touch the political and economic interests of the tribes. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 157 (1980) (discussing Indian commerce clause).

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constructed and operated primarily for the transportation of the driver or the driver and one or more nonpaying passengers. Such *nonresident* owners, when duly licensed in the state of residence, are hereby granted the privilege of operation of any such vehicle within this state to the extent that reciprocal privileges are granted to residents of this state by the state of residence of such nonresident owner." (Emphasis added.)

Any alleged Fourteenth Amendment claim of discrimination is equally without merit.[3] Kansas' reciprocity statute on its face creates no suspect classification. It does not expressly single Respondent's members out for special treatment or deny them benefits accorded other Kansas residents. Drivers of motor vehicles without Kansas registration and license plates are cited under Kan. Stat. Ann. § 8-142 (Supp. 2001) not because they are members of Indian tribes, but rather because they have failed to comply with a nondiscriminatory Kansas law. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.9 (1976). *See, Hendrick v. Maryland*, 235 U.S. at 622 (Automobile safety, like other health and safety matters, has traditionally been a matter of state regulatory concern, a traditional "police power.").

Not granting tribal members reciprocity does not violate the Fourteenth Amendment, because no one who is a resident of Kansas can claim the benefits of the reciprocity statute.[4] It is on this point that Respondent's reliance (and the concurrence in the decision below) on *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) is misplaced.

The Ninth Circuit in *Cabazon* determined that the California statute did not treat the tribe's police force the same as other police forces. *Cabazon*, 388 F.3d 691, 698. In analyzing the California statute, the Ninth Circuit determined that the relevant comparison was between law enforcement agencies. *Id.* 699.

Assuming *arguendo* a discrimination analysis is proper here, the proper analysis of Kan. Stat. Ann. § 8-138a within the context of this case is whether the statute treats *residents* of

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[3] The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly circumstanced ... be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[4] Reliance on *State v. Wakole*, 265 Kan. 53, 959 P.2d 882 (1998) is improper. First, the *Wakole* court never reached the question of discrimination. *Wakole*, 265 Kan. at 59. Second, the *Wakole* court never addressed preemption. Last, the *Wakole* decision reasoned that *Oklahoma* state law recognized the tribal tag in question, and therefore Kan. Stat. Ann. § 8-138a applied, extending reciprocity, not to the tribe, but to the State of Oklahoma. *Id.* at 55. This is a critical distinction from the case at bar.

Kansas who reside on Respondent's reservation, and *residents* of Kansas who reside outside of Respondent's reservation similarly.[5] When analyzed in this context, it is clear that no resident of Kansas (whether residing within or without Respondent's reservation) can claim reciprocity under Kan. Stat. Ann. § 8-138a. The reciprocity statute at issue here treats all Kansas residents equally. There simply is no discrimination present, and Respondent's assertion to the contrary is devoid of merit.

2. It is clear from the decisions below that Kansas has not in any fashion attempted to regulate or prohibit any on-reservation activity.[6] All that Kansas has ever maintained is that tribal tags and titles do not supplant Kansas license tags and titles off-reservation. In the context of this case, what Respondent requires of its members on-reservation is of no interest to Kansas.

To get around the fact that Kansas was not attempting to regulate on-reservation activity (Pet. App. 26-27), the majority was forced to conclude that the essential conduct at issue is

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[5] For discrimination purposes, it would be improper to compare Respondent to states. Indian tribes are not states. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). Tribal reservations are not states. *White Mountain Apache*, 448 U.S. at 143. Further, the term "state" for reciprocity purposes is defined by Kan. Stat. Ann. § 74-4305 (Supp. 1992) as: "a state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of a foreign country and shall have the same meaning in other statutes of this state relating to interstate relations for licensing of vehicles." Respondent is not any of these either.

[6] Respondent has argued that if Kansas is allowed to enforce its laws off-reservation, its ability to require tribal members to obtain tribal tags and titles will be defunct (Pet. App. 16). If Respondent's contention is that it has *no* ability to require its members to pay for a tribal tag or title, then the question becomes, how serious is its alleged governmental need to regulate who is on their reservation, and just what governmental power does it truly possess? If on the other hand Respondent contends that holding both tribal and State plates is more expensive and inconvenient for its members, that is simply irrelevant to the analysis. There are numerous instances in which persons are required to hold multiple licenses and pay multiple fees to different governmental entities. For example, dealers in alcohol, tobacco and firearms must pay for and hold various federal, state and local licenses. Hunters must pay for and possess both a federal and state license to hunt migratory waterfowl.

Respondent's issuance of tags on its reservation (Pet. App. 14). In support of its conclusion, the court below cited only *In re Blue Lakes Forest Prods., Inc.*, 30 F.3d 1138 (9th Cir. 1994).

Blue Lakes is clearly distinguishable. First, *Blue Lakes* concerned the harvesting of timber from lands held in trust by the United States for the tribe in question. *In re Blue Lakes* at 1139-40. The United States' interests in timbering on reservations is extensive. *White Mountain Apache*, 448 U.S. at 149. *See e.g.* 25 U.S.C. § 407 and 25 C.F.R. § 163. In this case, there is no federal legislation comparable to that in *Blue Lakes*. Second, there was a contract entered into between the tribe and the United States with respect to the severance and sale of the timber. *Blue Lakes*, 30 F.3d at 1139-40, 1141. No such contract exists in this case. *Blue Lakes* is a unique case expressly limited to its facts, and its analysis and conclusion have no application here.

The decision below is further suspect because of the activity the court of appeals chose to balance. As previously noted, the court below held the "essential conduct" for balancing purposes was Respondent's issuance of tags and titles. (Pet. App. 14). But Kansas has never attempted to regulate or bar that activity. When reviewing the balancing cases, they all concern an *on-reservation* activity that the state has overtly tried to tax, regulate or bar.[7] There is no controlling authority to support the court of appeals conveniently shifting the analysis away from what Kansas is attempting in fact to do (enforce its vehicle code off-reservation) to what Kansas is not attempting to do (regulate Respondent's issuance of its titles and tags), simply to get the result it sought to reach.

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[7] *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 161 n.1 (1980) (sale of tractors *on* reservation); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 836 (1982) (construction of an *on* reservation tribal school); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983) (application of state hunting and fishing laws to nonmembers of the tribe *on* reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205-06 (1987) (regulation of tribal bingo *on* reservation).

Respondent's assertion that there is no split of authority (Opp'n 19) is palpably inaccurate. Within the panel below there is a split. The majority held that *White Mountain Apache* balancing applies to preempt the Kansas statute, whereas the concurrence determined it did not. Respondent's positing that the reasoning and result in the Ninth Circuit decision in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004), "largely track the Tenth Circuit's decision at issue here." (Opp'n 19), is simply wrong. The court in *Cabazon* rejected *White Mountain Apache* balancing because the activity being regulated by the state occurred off-reservation, as it does here. *Cabazon*, 388 F.3d 691, 698. The *Cabazon* court's analysis and holding went to discrimination. Thus, there remains a split between the Tenth and Ninth Circuits as to whether *White Mountain Apache* balancing is proper when the activity being regulated by the state occurs off-reservation.

Further, requiring Kansas to extend reciprocity to Respondent's license plates runs afoul of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), which established the right of States to impose nondiscriminatory laws on the off-reservation conduct of tribes and their members. The practical effect of the decision below is to give extraterritorial reach to Respondent's authority – a result that is inconsistent with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Extending tribal authority in such a manner is doubly problematic here, since it has the effect of subjecting States to the exercise of a tribe's powers – a result the Ninth Circuit has found untenable. *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998). The decision below is at odds with all of the above-cited authority, and merits reversal by this Court.

3. In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court held that when a state's interests outside the reservation are implicated, it may regulate the activities of tribal members even on tribal land. *Hicks*, 522 U.S. at 361-62 (*citing Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. at 151.).

The decision below limits application of *Hicks* only to those cases where tribal interests attempt to interfere with State officers on-reservation. (Pet. App. 13). The principles *Hicks* espoused are not so limited. *Hicks'* analysis and the precedent it

rests upon address the broader question of the ultimate reach of Indian authority. The logical extension of *Hicks* is that a tribe's authority cannot be extended to preempt off-reservation enforcement of state law. *Hicks* affirmed the vitality of the rule of law expressed in *Mescalero* and *Colville*, and comports with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001) and *Montana v. U.S.*, 450 U.S. 544, 563 (1981).[8]

The authority of Indian tribes extends only "over . . . their members and their territory" because their dependent status generally precludes extension of tribal civil authority beyond these limits. *Atkinson*, 532 U.S. at 650; *United States v. Wheeler*, 435 U.S. 313, 326 (1978). A tribe's right to self governance or tribal immunity from state power is divested to the extent it operates independently of its territorial jurisdiction, *i.e.* "Indian Country." *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 & n.2 (1975).[9]

Conversely, the decision below now extends tribal authority beyond Respondent's reservation boundaries to preempt

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[8] The Court has recognized that there is a significant territorial component to tribal power and that it has no extraterritorial reach. *Mescalero Apache Tribe*, 411 U.S. at 148-49. *See Atkinson Trading Co.* 532 U.S. 645, 653-54 (2001). In such situations, a "categorical" rule consonant with the scope of state authority in the absence of congressional interdiction governs. As the Court explained seven years prior to *White Mountain Apache*, "tribal activities conducted outside the reservation present different considerations" and that, in such instances, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries generally have been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

[9] Respondent's citation to *Winters v. United States*, 207 U.S. 564 (1908), *United States v. Winans*, 198 U.S. 371 (1905), *Arizona v. California*, 373 U.S. 546 (1963) and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) are unavailing. Those cases deal with express treaty provisions that are not at issue here, or natural resources of the land, which are likewise not present here. *But see, Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962). (Involving tribes organized under the Reorganization Act, held that off-reservation activities are within the reach of state law. State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government.).

Kansas' jurisdiction off-reservation. To the extent the decision below is contrary to the holding and analysis of the above-cited, controlling authorities, it must be reversed.

4. The decision below cites generalized federal legislation, proclamations, and executive orders as evidence of preemptive federal interests (Pet. App. 17). None, however, address motor vehicle titling and licensing, and where public safety and the exercise of the states' police power is concerned, it may be fairly assumed that Congress does not act *sub silentio* or by inference. *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 429 (1966). This provides assurance that "the federal state balance" will not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In fact, the balance of federal interests concerning highway regulation are aligned with the states, not tribes. Federal legislation and regulations with regard to highways almost invariably authorize States to regulate and enforce their motor vehicle laws on their roads and bridges.

Examples of such federal regulation include the National Driver Registry Act, (which establishes a central national clearinghouse for information on drivers to assist States in exchanging information about motor vehicle driving records of individuals), 49 U.S.C.A. §§ 30301-30308; the National Motor Vehicle Title Information System, (which establishes a national clearinghouse of information on motor vehicle titles that will provide reliable access to information maintained by the states related to automobile titling), 49 U.S.C.A. §§ 30501-30505; and, the Federal Driver's Privacy Protection Act of 1994 (DPPA), (which mandated that states comply with Act's requirements with respect to disclosure of personal information from state driver's license records and required states to create and implement systems to enforce those requirements), 18 U.S.C.A. §§ 2721-2725. 23 U.S.C. § 402 (conditions States' receipt of federal funds for highway safety program on compliance with federal requirements, including vehicle registration and

licenses).[10] *See also, Uniform Guidelines for State Highway Safety Programs* 60 Fed. Reg. 36,641, which implements 23 U.S.C. § 402.

5. Last, the pernicious effect of the court of appeals' decision with respect to the States' administration of its laws off-reservation must be emphasized. Matters that states once thought were settled as matters of state interest (drivers license, teaching licenses, taxation, etc.) are now subject to the whims of whether a tribe writes a code and issues a license. Given *White Mountain Apache's* express recognition of the rule that off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary', states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, without reference to an *ad hoc* and amorphous test used to resolve the validity of on-reservation state activity.

The Court of Appeals' decision significantly contracts the States' sovereign power to regulate off-reservation transactions, constitutes a marked departure from the path-marking *Mescalero Apache Tribe*, and conflicts with precedent from this Court and the Ninth Circuit holdings cited above that the balance-of-interests test does not apply to off-reservation transactions.

Further, the court of appeals decision results in forced reciprocity. Forced reciprocity with any political entity when the plain language of the state statute is to the contrary is no less caustic to Kansas' sovereignty than the federal government compelling the States to enact or administer a federal regulatory program. *New York v. United States*, 505 U.S. 144, 188 (1992), or directing the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . it is the very *principle* of separate state sovereignty that such a law offends . . . *Printz v. United States*, 521 U.S. 898, 932 (1997) (Emphasis in the original).

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[10] 23 U.S.C. § 101 defines "state" to mean: "any one of the fifty States, the District of Columbia, or Puerto Rico." The term "Indian tribe" is conspicuously absent from the definition of "state."

Kansas has a long history of regulating and licensing motor vehicles on its roads and bridges. The current Kansas Motor Vehicle Statutes found at Kan. Stat. Ann. § 8-101 *et seq.* (Supp. 1992) have their origins in Kansas law in Chpt. 67, § 1 of the Kansas Statutes Annotated, enacted in 1903. Yet, nearly a century later, Respondent enacts a Vehicle Code and the decision below has extended its reach off-reservation to preempt Kansas' long standing off-reservation regulation of vehicles.[11]

There are no discernable limits to the decision below. Logically, the reasoning of the court of appeals can now be used to preempt *any* state authority off-reservation simply because a tribe decides to issue a license or assess a fee. Thus, Respondent could issue its own drivers licenses, commercial drivers licenses, teaching certificates, medical and dental licenses (all of which are traditionally a function of state government), and oust state law. There is nothing in our body of law that supports such a conclusion.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Kansas respectfully requests that the Court grant the petition for a writ of *certiorari*.

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[11] The court of appeals rejected Kansas' assertion that the dispute in this case is one of tribal control over Kansas. (Pet. App. 9). However, by preempting off-reservation application of Kansas law, the court of appeals has in practical effect extended tribal authority off-reservation. Thus, the decision ties Kansas' hands. This provides the same results as controlling Kansas: giving the tribe preemptive power off-reservation through the back door that it could not get through the front door under *Mescalero Apache*.